No. 42

# In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

*v.*

LOUIS H. PINK, SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AND AS LIQUIDATOR OF THE DOMESTICATED UNITED STATES BRANCH OF THE FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827; VICTOR YERMALOFF, AND OTHERS

*ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY*

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

### OPINIONS BELOW

The memorandum opinion of the Supreme Court of New York, New York County (R. 52), is not reported. Judgment of affirmance by the Appellate Division of the Supreme Court of the State of New York for the First Judicial Department (R. 57) was entered without opinion. The *per curiam* opinion of the New York Court of Appeals (R. 71–72) is reported in 284 N. Y. 555. The opinion of the New York Court of Appeals in *Moscow Fire Ins. Co.* v. *Bank of New York*,

which was the basis of the decision below in this case, is reported in 280 N. Y. 286. For the convenience of the Court, the *Moscow* opinion is reprinted in Appendix A, *infra*, pp. 86–123.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1940 (R. 65–66); the judgment of the Supreme Court, New York County, on remittitur from the Court of Appeals, was entered on January 7, 1941 (R. 67–68). The petition for a writ of certiorari was filed on March 29, 1941, and granted on May 5, 1941 (R. 73). The jurisdiction of this Court rests upon Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

The First Russian Insurance Company, which had established a branch in the State of New York, was dissolved by decrees of the Soviet Government in 1918 and its assets were nationalized. The effect of these decrees under Russian law was to transfer to the Soviet Government all rights of the Insurance Company in the assets of the New York branch. In 1933, these rights were transferred by the Soviet Government to the United States by the Litvinov Assignment. Previously, however, the New York assets, under orders of the New York courts, had been taken over by the New

York Superintendent of Insurance, who had paid all claims of domestic creditors. In the present action, brought by the United States against the Superintendent of Insurance and all foreign claimants of the assets, the United States seeks to establish that it has the same rights in the assets, remaining after the payment of all valid and enforceable claims, as the First Russian Insurance Company would have had, under New York law, had it not been dissolved. The principal questions involved are:

(1) Whether, after the United States granted recognition to the Soviet Government and accepted the Litvinov Assignment, the state courts had power to deny effect to the Soviet nationalization decrees upon grounds of a local public policy against confiscation.

(2) If not, whether there is any independent ground of state law upon which the state court refused to recognize the claim of the United States.

(3) Whether the contention that the Soviet decrees were not intended to cover the particular assets in controversy is available to respondent in this proceeding.

## INTERNATIONAL COMPACT AND STATUTES INVOLVED

The Litvinov Assignment and the relevant New York statutes are set forth in Appendices B and C, pp. 124–142.

## STATEMENT

The United States brought the instant action against the respondent,[1] the Superintendent of Insurance of New York, to recover the assets of the New York branch of the First Russian Insurance Company, which remained after the payment of the claims of all domestic creditors. The complaint alleged that such assets had by Russian law passed to the Government of Russia and had been assigned to the United States by that Government (R. 23–24). On motion of the respondent, the complaint was dismissed for failure to state a cause of action (R. 5–7).

*The pleadings.* The material facts set forth in the complaint may be summarized as follows: The First Russian Insurance Company, a corporation organized under the laws of the former Empire of Russia (R. 19), established a United States branch in the State of New York in 1907 (R. 22). In compliance with the laws of that state the company deposited with the Superintendent of Insurance of New York certain assets to secure the payment of all claims resulting from the transactions of the New York

[1] The foreign policyholders and creditors of the First Russian Insurance Company asserting rights in and to the surplus assets of the company were named as defendants in the complaint, but did not join in the Superintendent's motion to dismiss and for summary judgment. Their rights are involved on this appeal only to the extent that the Superintendent of Insurance represents them.

branch. In 1918 the Russian Government by various laws, decrees, enactments, and orders, made the business of insurance in all of its forms a state monopoly, dissolved all insurance companies, and cancelled the debts of such companies and the rights of the stockholders to any claims therein (R. 23). These laws and decrees also nationalized all of the assets and property of Russian insurance companies wherever situated (R. 23–24).

The New York branch of the First Russian Insurance Company continued to do business in New York until 1925. At that time the respondent took possession of its assets, pursuant to an order of the Supreme Court of New York, which directed him to determine and report upon the claims of the policyholders and creditors of the company in the United States (R. 25–26). Thereafter, all claims arising out of the business of the United States branch of the company (referred to herein as the claims of domestic creditors) were fully paid by respondent (R. 26–27) and there remained in his hands approximately $1,335,653.73 (R. 27). In determining the disposition that should be made of this surplus, the New York Court of Appeals, on February 10, 1931, directed that the respondent proceed to determine and pay the claims, first, of the foreign creditors who had filed attachments prior to the commencement of the liquidation proceeding in 1925 and, second, of

those foreign creditors who had filed claims with him prior to the entry of the order on the remittitur of the Court of Appeals. The respondent was then directed to pay any surplus to a quorum of the directors of the company (R. 28–29). See 255 N. Y. 415, 423. The respondent thereupon proceeded with the liquidation of the claims of those foreign creditors. From time to time certain claims have been allowed, and certain payments have been made thereon (R. 29–32). The major portion of the allowed claims have not been paid, their payment being stayed pending the disposition of the claim of the United States (R. 34).

On November 16, 1933, the United States recognized the Union of Soviet Socialist Republics as the *de jure* Government of Russia and in the course of and as an incident to that recognition accepted an assignment from the U. S. S. R. of all claims which it had against nationals of the United States. This is known as the Litvinov Assignment (R. 31).

On November 14, 1934, while the liquidation proceedings were pending, the United States commenced a suit against respondent in the District Court of the United States for the Southern District of New York, seeking to recover the assets still remaining in the hands of the respondent. On writ of certiorari this Court concluded that since the *res* was in the custody of a state court, the federal courts lacked jurisdiction to dispose of

the controversy and remitted the United States to the state courts for the determination of its claim (R. 32–33). *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 475.

The United States then moved for leave to intervene in the liquidation proceedings being conducted by the respondent. The motion was denied on March 14, 1936, "without prejudice to the institution of the time-honored form of action" (R. 33–34). That order was affirmed by the Appellate Division without opinion on June 30, 1936, and the Appellate Division and the Court of Appeals denied motions of the United States for leave to appeal to the Court of Appeals (R. 34). Thereafter, the present suit was instituted in the Supreme Court of New York. The complaint prayed that the respondent be enjoined from distributing the surplus, that the liquidation proceedings be stayed until the determination of the claim of the United States, and that the court vacate all awards to other than domestic creditors and order distribution of the entire surplus to the United States (R. 36).

Respondent answered admitting the material allegations concerning the Insurance Company, but denying the claim of the United States (R. 37–38). Six affirmative defenses were also pleaded (R. 38–49) including two separate defenses that the Soviet decrees relied upon by the United States were not intended to apply to property outside the territory of the U. S. S. R. and not taken into its actual custody (R. 46–47).

Following the decision of the New York Court of Appeals in *Moscow Fire Insurance Co.* v. *Bank of New York*, 280 N. Y. 286, affirmed by an equally divided court, 309 U. S. 624, rehearing denied, 309 U. S. 697, deciding, after a full trial, many of the same questions as are presented by the pleadings here, respondent moved, pursuant to Rule 113 of the New York Rules of Civil Practice and Section 476 of the New York Civil Practice Act, to dismiss the complaint and for summary judgment in his favor, on the ground that there was no merit to the action and that it was insufficient in law (R. 10). The affidavit in support of the motion stated that "There is no dispute as to the facts," and that the affirmative "defenses need not now be considered for the complaint standing alone is insufficient in law and must be dismissed" (R. 13).

*The action of the courts below.* The Supreme Court, New York County, dismissed the complaint on the authority of the *Moscow* case and entered summary judgment for respondent (R. 8–9). The Appellate Division, on May 17, 1940, affirmed without opinion (R. 57–58). On appeal pursuant to leave granted by the Appellate Division (R. 61–62) the Court of Appeals affirmed (R. 71–72).

The Court of Appeals rendered a *per curiam* opinion stating only that the "judgment appealed from is in accord with the decision of this Court in *Moscow Fire Ins. Co.* v. *Bank of New York*" and that it would "apply in this case the same

rules of law which the court applied in the earlier case. * * *." (R. 71–72). Accordingly, save as otherwise expressly noted, reference in the Argument to the opinion of the Court of Appeals will be to the opinion of the court in the *Moscow* case rather than to the *per curiam* opinion in this case.

*The claim of the United States.* Although, as stated above, the complaint prays that all assets remaining in the hands of the respondent after the payment of domestic creditors be turned over to the United States, the only relief presently sought is that the United States be recognized as the successor to the title and interest of the First Russian Insurance Company. Should this claim of the United States to be the successor of the Insurance Company be established, the further questions whether the New York courts may undertake distribution of the assets to foreign claimants and, if so, whether those claims are valid, will have to be determined in subsequent proceedings. The Court of Appeals held that the United States' claim of succession, considered on its own merits, was invalid, and that the United States could not, therefore, contest the distribution to other claimants even though it might subsequently be determined that all such claims were invalid and that the surplus funds were consequently *res nullius*. The correctness of that decision is the only question presented to this Court for review.

*The interest of foreign claimants.* A decision of this Court establishing that the New York courts must recognize the United States as successor to the Insurance Company will not of itself affect the rights of foreign claimants, including both creditors and stockholders, since, as we have stated, further proceedings will be necessary to determine whether the New York courts may distribute the assets and, if so, whether the foreign claims are valid. The principal interest of the foreign claimants in the present controversy, therefore, is the practical consideration that, if the United States' right of succession is recognized and its standing to contest the foreign claims is thus established, it may subsequently appear that New York may not lawfully undertake distribution or that the foreign claims are invalid and, therefore, that the foreign claimants are not legally entitled to any distribution. The foreign claimants, and particularly the stockholders, have the further interest that the rationale of decision, if favorable to the Government, may also support the invalidity of the foreign claims.[2]

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[2] Since the case is here on the pleadings, it is impossible to do more than indicate certain classes of claims which may be held baseless. The rights of creditors and stockholders dependent on transactions in Russia may have been validly destroyed by the nationalization decrees, or the creditors' ruble claims may be valueless. *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71; *Dougherty* v. *National City Bank*, 157 Misc. 849 (Sup. Ct.). The claims of non-Russian

*The interest of the State of New York.* Since all domestic creditors have been paid and the question of distribution to foreign creditors and stockholders is not involved, the State of New York has no interest whatever apart from the physical presence of the assets within the state.[3]

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creditors may be governed by the law of a country which recognizes the applicability of the decrees (e. g. Article 2 of the Treaty of Rapallo, April 16, 1922, between Germany and Soviet Russia). The non-Russian foreign claims also raise the question whether New York should remit them to the assets of the Insurance Company available at their domiciles, or in the countries where they did business with the company. *United States* v. *Manhattan Co.*, 276 N. Y. 396, 407. It may also be held that the rights of all claimants were validly abolished by the governing law of the state of incorporation. *Canada Southern Ry. Co.* v. *Gebhard*, 109 U. S. 527. Finally, creditors' claims may be held unsound for various individual factual and legal reasons.

[3] If the United States is not recognized as successor to the title or interest of the Insurance Company, the surplus remaining after the payment of any enforcible claims of creditors would in principle go to the State of New York by way of escheat, although so far no such claim has been asserted by or on behalf of the State. Rather, the entire surplus after payment of foreign creditors has hitherto been distributed to stockholders, as in the *Moscow* case. Cf. *Moscow Fire Ins. Co.* v. *Heckscher & Gottlieb*, 260 App. Div. 646, 647, 23 N. Y. Supp. (2d) 424, 427 (1st Dept.), affirmed 285 N. Y. 428. In the *Moscow* case, however, no contention was made as to the validity of the stockholders' claims. Under the rule in *Dougherty* v. *Equitable Life Assur. Society*, 266 N. Y. 71, claims of stockholders would seem to be invalid even in New York since founded on agreements made and to be performed in Russia and therefore validly cancelled by the Russian nationalization decrees.

SPECIFICATION OF ERRORS TO BE URGED

The New York Court of Appeals erred:

1. In holding that the residual right to the surplus funds of the local branch, which the court held belonged to the "parent" Russian insurance corporation, did not pass under the Soviet nationalization decrees because of a state policy against confiscation.

2. In holding that the Soviet law, which the court held normally determines the successor to the rights of a Russian insurance corporation under the New York law of conflicts, was unenforceable because of a state policy against confiscation.

3. In holding that, because the local branch, prior to its dissolution, had been a separate legal entity and had held the funds as its assets under state control and regulation, the courts of New York were free to pass judgment on the Soviet nationalization decrees.

4. In holding that the Litvinov assignment does not preclude the states from refusing to enforce the Soviet decrees on grounds of a local policy against confiscation.

5. In failing to hold that, by recognizing the Soviet Government and executing the Litvinov Assignment, the Executive Department of the Federal Government established as the policy of this nation that, in order to permit the settlement of all question outstanding between the two governments, no objection should be asserted to the

confiscation of the property of Soviet nationals wherever located.

6. In failing to hold that the policy of the State of New York is in direct conflict with the Federal policy and is therefore invalid.

7. In failing to hold that, even in the silence of the Federal Government, the State of New York may not refuse to apply the Soviet nationalization decrees to the property involved because of a local public policy against confiscation.

8. In holding that the local branch of the First Russian Insurance Company had existed as a separate and distinct corporate entity and that the funds deposited by the Insurance Company had been the assets of its New York branch.

9. In affirming the judgment dismissing the complaint.

## SUMMARY OF ARGUMENT

### I

The complaint alleges and the motion admits that the Soviet nationalization decrees were intended to apply to the assets of the First Russian Insurance Company in New York. The question is whether the decrees, if so intended, shall be given that effect in the courts of New York.

The court below recognized that the Insurance Company, but for its dissolution, would have had a "residual right" to the surplus funds, and further, that under the normal New York law of conflicts, the succession to that residual right would

be governed by Russian law. It refused to give effect to the Soviet nationalization decrees, however, because of a state policy against confiscation. This decision is in direct conflict with the decision in *United States* v. *Belmont*, 301 U. S. 324, and, considered as an original matter, is untenable.

A. In the *Belmont* case, this Court held that the recognition of the Soviet Government and the acceptance of the Litvinov Assignment validated the nationalization decrees so far as this country was concerned, and that when the aid of the courts is invoked in consummation of the Assignment, a state policy against confiscation is irrelevant. The *Belmont* case is directly in point and cannot be successfully distinguished. Here, as there, the United States claims as successor to the admitted rights of a foreign corporation.

The authority of the *Belmont* case has not been limited by the subsequent decision in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126. In that case this Court held that a foreign government was not entitled to immunity from local statutes of limitations, and that the Litvinov Assignment was not intended to remove the bar of such statutes. On the assumption that a foreign government has no immunity, the defect in the claim was one which would have existed regardless of its ownership or nationalization. Such questions are not ordinarily dealt with by the Executive Department of the Federal Government and it may be assumed that, in general, there was no intention to do so in the case

of the Litvinov Assignment. In this case, on the other hand, the question is whether enforcement may be denied to an otherwise valid claim on the sole ground that the Soviet nationalizaton decrees are abhorrent to the moral principles of the forum. This question is one which was dealt with in the Litvinov Assignment. Under the Assignment, and even in the silence of the Federal Government, the states are without power to deny effect to the Soviet decrees because of a local policy against confiscation.

B. The recognition and Assignment embody a federal policy that, in the interest of friendly relations, no objection should be asserted to the Soviet nationalization of the claims of Russian nationals to any property located in the United States. And this policy necessarily implies an intention to preclude the states from asserting any such objection.

That the Federal Government has no policy against the Soviet nationalization of such property is not controverted. The acceptance of the Assignment reflects the deliberate determination of the Executive Department that the enforcement of such a policy would be contrary to the interest of the United States. For more than fifteen years this Government had withheld recognition of the Soviet regime because, among other reasons, of its objection to the fundamental principles of the Soviet nationalization decrees. The purpose of the President in reversing this position was to remove all questions outstanding

between the two governments in order to permit the establishment of friendly relations. As the enforcement of a state policy against confiscation would restore the obstacle to friendly relations which the President sought to remove, the executive action must be construed to imply an intention to preclude the enforcement of such state policy.

The validity of the federal policy is clear. The President's power to grant or withhold recognition includes the power to determine the underlying policy. The executive power in respect of recognition also includes authority to prescribe the conditions of recognition. Since disagreement over the method of settlement of American claims against the Soviet Government had been one of the principal obstacles to the establishment of friendly relations, the President could agree to the use of the nationalized property of Soviet nationals as a method of settling the American claims and, to that end, determine that no domestic policy against confiscation should bar this method of settlement. Moreover, apart from its relation to recognition, the Litvinov Assignment and the federal policy embodied therein are a valid exercise of the power of the President to enter into international agreements without the consent of the Senate. Agreements for the settlement of American claims against foreign governments are among the most familiar examples of such compacts.

Since the executive policy is valid it is entitled to supremacy over the contrary state policy. The theory of the Constitution is that every valid act of any branch of the Federal Government is a "law of the United States" within the meaning of the Supremacy Clause.

C. Even in the silence of the Federal Government, the states are without power to deny effect to foreign decrees on grounds of a state public policy against confiscation. This Court has so held where property which has been confiscated by a foreign sovereign in its own territory is brought within the custody of a local court. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297. The doctrine rests on the broad ground that for the courts of one country to pass judgment on the acts of another sovereign would vex the peace of nations. There is no reason for a different conclusion where the foreign sovereign attempts to nationalize property of its nationals which has always had its situs here. The denial of effect to the foreign decrees is of as much concern to the foreign sovereign in the one case as in the other and the refusal to enforce the decrees because of opposition to the fundamental principles of the decrees is apt to be regarded by the foreign sovereign as a hostile act in either case.

## II

The decision below cannot be rested on the independent ground of local law that the New York

branch had been a juristic entity separate and distinct from the Insurance Company. Analysis of the opinion of the Court of Appeals demonstrates that, despite the discussion of the separate entity theory, the basis of the decision was intended to be and must have been the view that the Soviet decrees, because of their confiscatory character, are contrary to the public policy of New York. No other interpretation adequately explains the conclusion reached. And under any other construction of the opinion, the decision would be so palpably without basis in New York law as to require invocation of the rule that, where a federal right is asserted, neither plainly untenable non-federal grounds nor any cloak or pretext to evade the federal claim can preclude this Court from deciding the federal question.

## III

The complaint alleges that the effect of the Soviet decrees, as a matter of Russian law, was to nationalize the assets of the First Russian Insurance Company, wherever situated, including the company's residual right in the assets of its New York branch. Respondent raised no issue with respect to this allegation and the court below decided none. The decision, therefore, cannot be rested on the ground that the Soviet decrees were not intended to reach the assets here in controversy.

## ARGUMENT

The position of the United States in this litigation is essentially simple. The Soviet Government by its nationalization decrees took over whatever rights the Insurance Company had in the assets of its New York branch. These rights the Soviet Government transferred to the United States by the Litvinov Assignment. In this litigation, the United States seeks to establish only that, by virtue of the nationalization decrees and the Litvinov Assignment, it has succeeded to such title and interest in the New York assets as the Insurance Company would have had under New York law had it not been dissolved.

The opinion of the court below denying this claim of the United States is quite confused in its reasoning. This much is entirely clear, however: The Court of Appeals recognized, *first*, that if the Insurance Company had continued to exist, the New York assets remaining after the payment of domestic creditors would have been transmitted to the company at its domicile; and *second*, that if the company had been in liquidation, the assets would have been transmitted to the domiciliary liquidator or administrator. 280 N. Y. at 299, 310. In other words, no question was raised by the Court of Appeals either as to the title of the Insurance Company to the assets or as to the proposition that ordinarily under the New York law of conflicts the person entitled as successor to the assets of a foreign insurance company under the law of its domi-

cile is entitled to be recognized as successor to any title or interest of the company in assets located in New York. Further, the Court of Appeals did not question that the Litvinov Assignment transferred to the United States whatever rights the Soviet Government then had to the assets.

The basis of the decision below must have been, therefore, that, under the public policy of the State of New York, the New York courts will not give effect to any transfer of rights under the Soviet nationalization decrees because of their confiscatory character. While the court disavowed any intention of applying the local public policy to property "situated elsewhere", it refused effect to the Soviet decrees upon the express ground that "confiscatory" decrees "do not affect the property claimed here" (280 N. Y. at 314). Analysis of the opinion of the court, undertaken later in this brief (pp. 57–63), confirms this conclusion.[4]

[4] The court below also held that the local branch, prior to the time that it was liquidated and "ceased to exist" (280 N. Y. at 310), had been a separate legal entity (*id.* at 308, 311) and that the funds deposited in New York had been "its assets" (*id.*, 313). As we show below, however, this conclusion is not inconsistent with the court's express recognition of the "residual right" (*id.*, 314) of the "parent" Russian corporation and of the normal New York rule of conflicts that the successor to a foreign corporation is determined by the law of its domicile (*id.*, 299, 310). The discussion of the separate entity theory was merely intended to establish that, although the Soviet law might be applicable under the normal New York rules of conflicts, the local courts were not precluded by the doctrine of *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, from passing judgment on the Soviet law in the circumstances of this case (see pp. 60–61, 68, *infra*).

The principal question in the case, therefore, is whether, after the United States had recognized the Soviet Government and had accepted the Litvinov Assignment, the states were precluded as a matter of constitutional law from denying effect to the Soviet nationalization decrees upon grounds of a local public policy against confiscation. This Court answered that question in the affirmative in *United States* v. *Belmont*, 301 U. S. 324, a case on all fours with the present one. Our principal argument, therefore, will be devoted to establishing that the *Belmont* case was correctly decided and that its authority is in no way impaired by the subsequent decision in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126.

One further preliminary observation is necessary. A large part of the *Moscow* opinion is devoted to the question whether there was support in the record for the finding of fact by the referee in that case that, as a matter of Russian law, the Soviet nationalization decrees were not intended to cover the assets of a New York branch of a Russian insurance company. That question, as we point out in some detail below (pp. 78–84), is not presented in this case, since the complaint here alleges as a fact that the Soviet decrees were intended to cover the assets in controversy (R. 23–24), and no issue with respect to this allegation was raised by respondent's motion for summary judgment or decided by the court below.

## I

### THE STATE COURTS ARE WITHOUT POWER UNDER THE FEDERAL CONSTITUTION TO DENY EFFECT TO THE SOVIET NATIONALIZATION DECREES UPON GROUNDS OF A STATE POLICY AGAINST CONFISCATION

#### A. THE DECISION OF THIS COURT IN UNITED STATES V. BELMONT, 301 U. S. 324, IS CONCLUSIVE

In *United States* v. *Belmont*, 301 U. S. 324, the United States sued as assignee of the Soviet Government to recover a sum of money deposited by a Russian corporation with the defendant bank. The complaint alleged that the Soviet Government had dissolved the corporation and nationalized its assets, wherever located, that the bank deposit thereby became the property of the Soviet Government and that it was assigned to the United States under the Litvinov Assignment of November 16, 1933. The Circuit Court of Appeals for the Second Circuit held that a motion to dismiss should be granted, upon the ground that the debt had acquired a situs in New York and that to give effect to the Soviet decrees as applied to such assets would be contrary to the public policy of New York. 85 F. (2d) 542. This Court reversed. It held that the effect of the recognition of the Soviet Government and of the Litvinov Assignment was "to validate, so far as this country is concerned" the decrees of the Soviet Government nationalizing all property of Russian corporate nationals, including the bank deposit in the United States (301 U. S. at 330); that "no state policy can prevail against the interna-

tional compact here involved" (*id.*, 327); and that "state constitutions, state laws, and state policies are irrelevant * * *". *Id.*, 332. In reaching this conclusion, the Court invoked the doctrine, announced in *Underhill* v. *Hernandez*, 168 U. S. 250, and *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, that every sovereign state must recognize the independence of every other sovereign state and may not, therefore, sit in judgment on the acts of another government, done within its own territory. The Court referred with approval to the decision of the English Court of Appeal in *A. M. Luther* v. *James Sagor & Co.*, [1921] 3 K. B. 532, holding that the question whether the nationalization decrees of a recognized government should be refused recognition because opposed to public policy and moral principle was one for the determination of the sovereign acting through his ministers.

The *Belmont* case cannot be successfully distinguished. The fact that it was decided on a motion to dismiss provides no basis for distinction, since the same is true here, nor does it serve to obscure the import of the decision. The motion to dismiss may have been taken to admit that the Soviet decrees were intended to reach assets located abroad insofar as questions of foreign law are treated as issues of fact. But obviously it did not admit the legal conclusion that the decrees, so construed, must be given effect in New York or that the Soviet Government acquired by nationalization a title which the law of New York

was bound to recognize, and neither the Circuit Court of Appeals nor this Court attributed any such admission to the motion. Nor is the difference in the nature of the assets involved material in any way. The holding of the Circuit Court of Appeals that the debt in the *Belmont* case, although an intangible, had acquired a situs in New York was supported by ample precedents, as the cases cited in the court's opinion disclose. See 85 F. (2d) at 543–544. This ruling was adverted to in the opinion of this Court (301 U. S. at 327) but the Court apparently concluded that the situs of the property was irrelevant. Finally, it is immaterial that "legal" title to the surplus funds here involved was always vested in a local trustee and that the assets may have been those of a separate New York "juristic personality" prior to its dissolution. 280 N. Y. at 309. The question presented is whether the Soviet Government succeeded to whatever residual right the Russian corporation possessed. And on this question even the minority in the *Belmont* case apparently recognized that New York was bound to recognize the Soviet Government "as the successor of its national", although they were of the view that New York was free to subordinate this interest to that of other claimants. 301 U. S. at 335.

The authority of the *Belmont* case is not limited by the subsequent decision of this Court in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126. In that case, this Court held that sovereign im-

munity from local statutes of limitation does not extend to foreign sovereigns, that a claim acquired by the United States after the running of the statute of limitations is subject to the statutory bar in the hands of the United States, and that the Litvinov Assignment was not intended to enlarge the rights of the United States, but merely to empower it to collect the claims "in conformity to local law." 304 U. S. at 143. In other words, apart from the holding with respect to sovereign immunity, an issue not here involved, the decision was merely that defenses to the merits of an assigned claim which would be available under local law regardless of the ownership of the claim were not intended to be barred by the Litvinov Assignment. The question in this case, as in the *Belmont* case, is the wholly different one of whether the states have power to deny enforcement of a *valid* claim simply because the nationalization decrees under which ownership of such claim was transferred from the Insurance Company to the Soviet Government are considered contrary to the moral principles of the forum. This question, as we show below (pp. 26–35), and as this Court held in the *Belmont* case, is one that is dealt with in the Litvinov Assignment by necessary implication. That the court did not consider the rule of the *Belmont* case to be even remotely involved in the *Guaranty* case is evident from the fact that it nowhere undertook to distinguish the prior decision.

Although we believe that the *Belmont* case is decisive of the present one and that its authority has not been impaired by any subsequent decision of this Court, the adverse decision of the court below compels us to argue further that, considered as an original question, the *Belmont* case was correctly decided.

B. THE NEW YORK POLICY IS IN CONFLICT WITH THAT OF THE EXECUTIVE DEPARTMENT OF THE FEDERAL GOVERNMENT AND IS THEREFORE INVALID

The Executive Department of the Federal Government, in recognizing the Soviet Government and accepting the Litvinov Assignment, has established as the policy of the nation that, in order to settle all questions outstanding between the two governments and particularly in order to provide a method for the settlement of American claims against the Soviet Government, no objection should be asserted to the Soviet nationalization of the property of Russian nationals, wherever situated. This executive policy, which the Executive Department had constitutional power to adopt, is in conflict with the local policy announced below and under the Supremacy Clause, or even apart from that clause, the state policy must yield.

*The conflict between the executive policy and that of the State of New York.* For more than fifteen years the United States withheld recognition from the Soviet regime because of the fundamental Soviet policy of nationalization and the failure to

reach an agreement for the settlement of mutual claims and counterclaims incident to the Soviet revolution. In 1933, however, President Roosevelt, in order "to end the present abnormal relations between the hundred and twenty-five million people of the United States and the hundred and sixty million people of Russia" invited President Kalinin to designate representatives to explore "all questions outstanding between our countries." See Official Document of the State Department, Eastern European Series No. 1, 1933, p. 1.

Thereafter, on November 16, 1933, the Government of the United States accorded diplomatic recognition to the Soviet Government. As part of the recognition proceedings, the Soviet Government, in an exchange of correspondence between its representative, Maxim Litvinov, People's Commissar for Foreign Affairs, and the President of the United States, made a written assignment to the United States of all claims against American nationals, either due or found to be due, "preparatory to a final settlement of claims and counterclaims" between the two governments and their respective nationals. The Soviet Government agreed not to pursue existing litigation nor initiate new suits to recover amounts "admitted to be due or that may be found to be due it" from American nationals, and assigned all such amounts to the United States. In return, the Soviet Government asked and received assurance from the

United States that it would be duly notified in each case of any amount realized by the United States from the release and assignment.

On the same day, President Roosevelt and Mr. Litvinov issued a joint statement to the following effect:

> In addition to the agreements which we have signed today, there has taken place an exchange of views with regard to methods of settling all outstanding questions of indebtedness and claims that permit us to hope for a speedy and satisfactory solution of these questions which both our Governments desire to have out of the way as soon as possible.

And, in a letter to Mr. Litvinov dated November 23, 1933, President Roosevelt declared:

> I am profoundly gratified that our conversations should have resulted in the restoration of normal relations between our peoples and I trust that these relations will grow closer and more intimate with each passing year. The cooperation of our governments in the great work of preserving peace should be the corner stone of an enduring friendship.

Several facts concerning the recognition and Assignment should be noted. The parties intended the Assignment to cover all nationalized claims of Russian nationals to assets located in the United States. See *United States* v. *Belmont*, 301 U. S. 324, 327. Any ambiguity that might have existed in the language of the original instrument was

subsequently removed by the letters exchanged between Commissar Litvinov and the American Charge d'Affaires on January 7, 1937, printed in Appendix D, *infra*. The amounts recovered on these claims, as the express language of the communications reveals, were intended to be used in satisfaction of claims of the United States against the Soviet Government arising out of alleged injuries to the United States and its nationals. Cf. Sack, *Diplomatic Claims against the Soviets* (1918–1938) II, (1939) 16 N. Y. U. L. Q. Rev. 253, 262–264, 277–279.[5] And the avowed purpose of the President in entering into this agreement was to settle "all questions outstanding" between the two countries "in order to end the abnormal relations" between the "people of the United States and of Russia" and thus to promote "the cooperation of our governments in the great work of preserving peace * * *."

It is clear from these facts that the Executive Department of the Federal Government has no

[5] The United States has adopted the policy of holding all amounts realized under the Assignment for the benefit, in whole or in part, of American private claimants against Russia. See the Letter of the Department of State, quoted in Appendix F, *infra*, p. 149. The Joint Resolution of August 4, 1939, 53 Stat. 1199, provides for the appointment of a Commission to determine the claims of American nationals against the Soviet Government. The committee reports set forth a letter from the Secretary of State referring to past and prospective recoveries under the Assignment as one of the reasons for the creation of the Commission. S. Rep. No. 767, 76th Cong., 1st Sess.; H. Rep. No. 865, 76th Cong., 1st Sess.

policy against the Soviet nationalization of the property of its nationals located in the United States. The respondent does not and cannot contend the contrary; manifestly, the President could not have accepted the assignment of nationalized claims to property in the United States while reserving an objection on the part of the United States to the policy of nationalization. The sole question is whether the absence of any such objection reflects the mere silence of the Federal Government on this question or, on the other hand, its affirmative determination that the assertion of such an objection would be contrary to the best interests of the United States. Cf. *Hines* v. *Davidowitz*, 312 U. S. 52, 71. If the latter, then, as we show below, an intention to preclude the states from asserting such an objection must be implied. *Hines* v. *Davidowitz, supra*, at 67–68, 71–72, 74.

The President, we submit, determined that the assertion of such an objection would be prejudicial to the interests of the United States. For more than fifteen years the Executive Department had withheld recognition because, among other reasons, of its objection to the fundamental nationalization policy of the Soviet regime. See statements of Secretaries of State Colby and Hughes, printed in *Russian Socialist etc. Republics* v. *Cibrario*, 235 N. Y. 255, 263–265. In 1933, the President not only reversed the policy of nonrecognition, but, as we

have stated, removed the objection to the Soviet policy of nationalization on which nonrecognition had, in part, been based. The avowed purpose of the recognition and Assignment was to remove "all questions outstanding" between the two governments and, in particular, to facilitate the settlement of American claims against the Soviet Government, and the removal of the prior objection to the Soviet nationalization policy was manifestly for the same purpose. By accepting the Assignment, the President must have determined that, in order to achieve these ends, the United States should disavow any concern in what the Soviet Government had done with respect to the property of its nationals. Indeed, no other conclusion accords with the usual assumptions of friendly international relations.[6]

The enforcement of a state policy against confiscation would restore the very obstacle to friendly relations which it was the purpose of the President to remove. The executive action therefore

[6] It is true, as we show below, that the results of this interpretation of the executive intention brings the national policy into conflict with, and thereby invalidates, the state policy. This result, however, is no reason for refusing to give the executive policy the construction which we have suggested. An executive agreement, like a treaty, should be construed in the spirit of *uberrima fides* to promote cordial relations between the parties (*Tucker* v. *Alexandroff*, 183 U. S. 424, 437) and so as to promote equality and reciprocity (*Geofroy* v. *Riggs*, 133 U. S. 258, 271), even though this may bring a state law into conflict with the compact. *Nielsen* v. *Johnson*, 279 U. S. 47, 52.

necessarily implies an intention to preclude the states from enforcing a contrary policy. On this aspect of the case, *Hines* v. *Davidowitz*, 312 U. S. 52, furnishes persuasive authority. There this Court found a conflict between the federal Alien Registration Act and a state enactment on the same subject, although the federal statute did not expressly prohibit state legislation and the provisions of both statutes could have been simultaneously enforced. The Court emphasized that for many years the Congress had refused to provide for the registration of aliens because of objection to certain provisions of proposed bills on the subject which it feared might unduly harass the aliens. The Court pointed out that Congress had deliberately omitted these objectionable features in the statute enacted and had included therein certain safeguards for the aliens. The state statute, on the other hand, contained the very provisions which the Congress had deliberately omitted. In these circumstances the Court held that the federal act evidenced a Congressional intention to protect aliens from undue harassment and that its enactment therefore precluded enforcement of state legislation which might engender the evil consequences against which the Congress had sought to guard. In reaching this conclusion, the Court emphasized that the legislation was "in a field which affects international relations, the one aspect of our government that from the first has been

most generally conceded imperatively to demand broad national authority." *Id.*, 68.

In this case there is even stronger reason for believing that state action contrary to the federal policy was intended to be precluded. In the direct conduct of our foreign relations the Federal Government and, in this case, the President, have exclusive authority and both in legal theory and traditional usage speak for the entire nation. It can scarcely be supposed, therefore, that, while dealing with the Soviet Government in respect of the settlement of debts between the two nations, an exclusively federal function, the Chief Executive of the United States would have declared that any objections to the nationalization of the property of Russian nationals should be waived in the interest of friendly relations and yet have intended to allow the states to frustrate that national policy by enforcing a contrary local policy. This is not a case in which there is room for the concurrent enforcement of differing national and local policies; the two policies here are directly opposed and the enforcement of either must necessarily defeat the other.

This Court did not hold to the contrary in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126. That case dealt only with the question whether the Litvinov Assignment was intended to remove defenses to the merits of the assigned claims which would otherwise exist under local law regardless of

the ownership of the claims. The issue was no different than that which would have been involved if a claim of title to realty asserted by a Russian national had been rejected on the ground that the deed was defective under the law of the state in which the property was located. This is the type of question which is ordinarily governed by the local law of the states and which the Executive Department is not equipped to and ordinarily does not undertake to decide. In the absence of some indication to the contrary, therefore, it may reasonably be assumed that the Executive Department did not pass upon such questions in recognizing the Soviet regime or in accepting the Litvinov Assignment. The Government made no argument to the contrary in the *Guaranty* case, its primary contention being that there was a distinction between right and remedy, and that if the right was not barred, the United States was under a duty to the Soviet Government to provide a remedy.

It is true that the invalidation of any claim on the ground that it is defective under state law regardless of ownership tends to lessen the effectiveness of the agreed method for the settlement of American claims against the Soviet Government. But there is nothing to indicate that the President ever considered the question whether such defects should be removed in order to facilitate the settlement of American claims; indeed, apart from the Volunteer Fleet Corporation

claim, no specific claim was even mentioned in the Assignment.

The question whether the confiscatory character of the nationalization decrees should be deemed a bar to the enforcement of the assigned claims stands on a very different footing. As we have shown above, this is a question which the President must necessarily have considered at the time of negotiating for the Assignment and acceptance of the Assignment must therefore necessarily be deemed to reflect an executive determination that, in the interest of friendly relations with the Soviet Government, this objection should not be asserted.[1]

*The validity of the executive policy:* The validity of the federal policy, if embodied in a formal treaty, would not be open to doubt, even if it be assumed that the states have concurrent power to regulate the subject in the silence of the Federal Government. *Santovincenzo* v. *Egan*, 284 U. S. 30; *Hauenstein* v. *Lynham*, 100 U. S. 483; *Sullivan* v. *Kidd*, 254 U. S. 433; *Asakura* v. *Seattle*, 265 U. S. 332; *Missouri* v. *Holland*, 252 U. S. 416;

[1] The policy of the Assignment may arguably make local law inapplicable in other respects not here pertinent. Conflicting state law operating in a field intimately and exclusively related to the field occupied by the Assignment should not prevail. Thus in other cases arising under the Assignment the Government urges that the policy of marshalling Russian assets for American creditors and the principle of immunity of the foreign sovereign from suit require that set-off of claims against the State of Russia be limited to the same transaction as the claim sued upon.

*Terrace* v. *Thompson*, 263 U. S. 197, 222–224; *Frick* v. *Webb*, 263 U. S. 326; *Hines* v. *Davidowitz*, 312 U. S. 52, 69, fn.[*] The sole issue with respect to the validity of the executive policy, therefore, is whether the powers of the President in the conduct of foreign relations include the power, without the consent of the Senate, to determine the public policy of the United States with respect to the Soviet nationalization decrees. This question, we submit, must be answered in the affirmative.

It is settled that "What government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government". *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 137; *Gelston* v. *Hoyt*, 3 Wheat. 246, 323; *Jones* v. *United States*, 137 U. S. 202, 212. The authority of the political department is not

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[*] The Fifth Amendment has no bearing. The public policy embodied therein has no application to the action of foreign powers with respect to the property of their nationals, particularly their corporate nationals. *United States* v. *Belmont*, 301 U. S. 324, 332. On this point there was no dissent in the *Belmont* case. Nor is there any suggestion that a public policy contrary to that of the Chief Executive may be found in an act of Congress or treaty. And the courts have no independent power to formulate a public policy of the United States. The only sources of law from which the courts may derive such policy are the Constitution, Congressional enactments, treaties and executive acts. *Kennett* v. *Chambers*, 14 How. 38, 50; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 137–138; cf. *Board of Commissioners* v. *United States*, 308 U. S. 343, 349–350.

limited, however, to the determination of the government to be recognized. The President is also empowered to determine the policy to govern the question of recognition. Objections to the President's determination of the government "as well as to the underlying policy" must be addressed to the political department. *Guaranty Trust Co.* v. *United States, supra,* at 137–138. Such has long been the settled doctrine of this Court. *Kennett* v. *Chambers,* 14 How. 38, 50.

The power to formulate policy may also be rested on the President's power to enter related agreements for the settlement of outstanding questions affecting the determination of the question of recognition. Limited or conditional recognition is well known to international law and is often a necessary instrument in the conduct of foreign relations. 1 Moore, *Digest of International Law* (1906) sec. 27, pp. 73–74; 1 Hackworth, *Digest of International Law* (1940) secs. 34, 48. The recognition of the Soviet Government was itself accompanied by several undertakings by that Government to be fulfilled both in its own territory and in this country. 1 Hackworth, *loc. cit. supra.* In return, the United States assumed certain obligations toward the Soviet Union. To establish such mutual rights and duties was not outside the plenary authority of the President to recognize foreign nations. As the New York Court of Appeals

observed in *Russian Reinsurance Co. v. Stoddard*, 240 N. Y. 149, 168:

> * * * the responsibility rests upon that branch of our government to determine in the first instance whether and upon what terms the Soviet government should hereafter be recognized * * *.

The Litvinov Assignment was plainly a legitimate exercise of the President's authority to determine the conditions of recognition. The claims of American nationals against Russia had been one of the principal obstacles to the establishment of friendly relations and the use of Soviet assets to satisfy those claims was a reasonable means of reaching a settlement. To effectuate the agreement the President could therefore remove any grounds of domestic policy which might prevent such use of the Soviet assets.

Independently of his powers in respect of recognition, the President has power to establish a national policy under his authority to make agreements with foreign powers. The authority of the President to enter into executive agreements with foreign nations without the consent of the Senate is established. *Principality of Monaco* v. *Mississippi*, 292 U. S. 313, 331, *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 306, 316; *State of Russia* v. *National City Bank*, 69 F. (2d) 44, 48 (C. C. A. 2d); Corwin, *The President: Office and Powers*, 228–240; Sayre, *The Constitutionality of the Trade Agreements Act* (1939) 39 Col. L. Rev.

751; Levitan, *Executive Agreements: A Study of the Executive in the Control of the Foreign Relations of the United States* (1940) 35 Ill. L. Rev. 365; Moore, *Treaties and Executive Agreements* (1905) 20 Pol. Sci. Quar. 385, 389–392, 399–417. That the Litvinov Assignment is an appropriate exercise of the power seems clear. Indeed, one of the most familiar examples of executive agreements are those involving the settlement of claims against foreign nations (see Sayre, *op. cit. supra* at 754, n. 6) and it is evident that the devotion of Soviet assets in the United States to the payment of American claims was a reasonable method of settlement.[9]

The authority of the President to enter into an international compact does not depend in any way on whether the subject is one which the states have the power to regulate in the silence of the Federal Government. The principal reasons, so far as material here, for placing a limitation on the power of the President to execute a "treaty" were (1) the fear of abuse for personal advantage,[10] and (2) the view that vital commercial interests should not be surrendered without the consent of a deliberative body representative of all

[9] The President, it is true, has apparently refrained from entering into executive agreements obligating the United States to make payments of money (Wright, *Control of American Relations*, p. 244) presumably for the reason that the power of appropriation is vested in Congress. No such difficulty, of course, is presented here.

[10] The Federalist, Nos. 64, 75.

the sections of the country."[11] The only special interests of the states which were considered in this connection were those relating to rights of navigation on the Mississippi and, to a lesser extent, coastal fisheries (Warren, *The Making of the Constitution,* pp. 653–658), both of which were dependent on treaties or the law of nations and not on the law of any state. Farrand, *Records of the Federal Convention of 1787, IV* (rev. ed., 1937), p. 58. Neither of these reasons, of course, is applicable to the determination of whether or not the Soviet nationalization decrees are opposed to our national public policy.

*The supremacy of the executive policy:* Since the formulation of national policy on the recognition of the Soviet decrees is within the constitutional power of the President, it is a "law of the United States" within the meaning of the Supremacy Clause of the Constitution.[12] The theory of the Constitution is that whatever is done by any branch of the Federal Government, acting within its constitutional power, is a "law of the United States". "All constitutional acts of power, whether in the executive or in the judicial department, have as

[11] The Federalist, Nos. 64, 75; Warren, *The Making of the Constitution*, pp. 653–658, 773–774.

[12] It is at least arguable that, just as the powers of external sovereignty of the Federal Government do not depend on a constitutional grant (cf. *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318), so the supremacy of any act of the political departments in this field should be implied without regard to the Supremacy Clause.

much legal validity and obligation as if they proceeded from the legislature; * * *." The Federalist, No. 64. Rules of decision which the Federal courts are empowered to formulate are undoubtedly "laws of the United States". Cf. *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 109; *Board of County Commissioners of Jackson County* v. *United States*, 308 U. S. 343.[13] Executive policy established in the valid exercise of executive authority stands on the same footing.[14]

The decision in *Kennett, et al.* v. *Chambers*, 14 How. 38, is decisive of the issue. In that case suit was brought for specific performance of a contract, made in Ohio, pursuant to which a military officer of Texas agreed to convey land in Texas to the plaintiff in consideration of the plaintiff's agreement to furnish money to the officer to enable

[13] It may be noted that, under the Rules of Decision Act, Section 34 of the Judiciary Act of 1789, 28 U. S. C. § 725, the "laws of the several States" include state common law decisions. *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

[14] It was partly because the acts done by each branch of the Government within its constitutional authority were deemed to have the force and effect of law that the consent of the Senate was required for the making of treaties. See The Federalist No. 75. Any inference that the President may not enter into executive agreements without the consent of the Senate has been since overborne by constitutional practice, usage, and by judicial decision. The underlying theory of the framers, however, that every act of any branch of the government within the scope of its constitutional powers has the binding force of law has been consistently confirmed by practice and decision throughout our constitutional history.

the latter to raise and equip troops for Texas' war against Mexico. The contract was made prior to the recognition of the independence of Texas by this country. The contract was held void and unenforcible on the ground that it conflicted with the policy of the Executive Department. The Court found that the Executive Department had deliberately concluded that recognition would have been improper at the time the contract was made and had taken measures to insure this Government's absolute neutrality in the war. The Court then stated (14 How. at 49–50):

> The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. * * * our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes, or in contravention of the known and established policy of the political department, acting within the limits of its constitutional power.

The Court, it is true, placed some reliance on a treaty between the United States and Mexico recognizing Texas as part of the territory of Mexico, but the opinion expressly proceeded on the ground

that the application of the treaty depended on the policy of the President and that that policy was "obligatory upon every citizen of the Union" (*id.*, 49).

In answer to the contention that the agreement was validated by the laws of Texas after its recognition, the Court held that the executive policy was superior to any state law. The Court pointed to the fact that the contract was made in Ohio as one ground for rejecting the contention, but added (p. 51):

> But had the fact been otherwise, certainly no law of Texas then or now in force could absolve a citizen of the United States, while he continued such, from his duty to this government, nor compel a court of the United States to support a contract, no matter where made or where to be executed, if that contract was in violation of their laws, or contravened the public policy of the government, or was in conflict with subsisting treaties with a foreign nation.

The court below has heretofore recognized that the executive policy is binding on the state courts. In *Russian Socialist, etc., Republics* v. *Cibrario*, 235 N. Y. 255, the Court of Appeals held that, prior to recognition, the Soviet Government could not be permitted to sue as party plaintiff in the New York courts. The decision was placed upon the ground that the federal policy underlying non-recognition was inconsistent with permitting the

Soviet Government to sue and recover property which might be used against the interests of the United States.

The authority of the President to establish controlling national policy in the conduct of foreign relations has also been recognized by the lower New York courts. *Anderson* v. *N. V. Transandine Handelmaatschappij* (*State of the Netherlands, Intervenor*), 28 N. Y. Supp. (2d) 547 (Sup. Ct.), held that a decree of May 24, 1940, issued by the Netherlands Government in exile, vesting in the State of Netherlands title to all Dutch intangible assets in foreign countries, would be given effect in the New York courts, since the Department of State, at the request of the foreign government, had taken official cognizance of the decree and the enforcement of the decree was therefore in accord with the public policy of the United States.[15] See also *Koninklijke Lederfabriek "Oisterwijk," N. V.* v. *Chase Nat. Bank,* Sup. Ct., N. Y. Co., N. Y. Law Journal, September 26, 1941. The court, it is true, also found that the New York policy was not opposed. The problem presented by the executive recognition of the Netherlands decree is now one of current and substantial importance. Decrees of like character promulgated by the governments in

[15] In *Hamilton* v. *Accessory Transit Company*, 26 Barb. 46, 50 (N. Y. 1857), the Supreme Court of New York, General Term, refused to recognize a Nicaraguan decree because it was opposed to the declared policy of the Department of State.

exile of Belgium and Luxembourg have received similar recognition by the Executive Department and, in view of the conditions prevailing abroad, the question may be presented in other situations. It is inconceivable that the states should have the power to frustrate such decrees which have received the imprimatur of the Executive Department of the Federal Government.

C. THE STATES ARE WITHOUT POWER TO DENY EFFECT TO THE SOVIET DECREES ON GROUNDS OF A LOCAL PUBLIC POLICY AGAINST CONFISCATION EVEN IN THE SILENCE OF THE FEDERAL GOVERNMENT

If, despite the contentions which we have advanced, this Court should hold that the Litvinov Assignment does not reflect a federal policy in conflict with the local policy enforced by the court below, the further question would be raised whether, in the silence of the Federal Government,[16] the states have any power to deny effect

[16] By "silence" of the Federal Government is meant the absence of any policy on the specific subject of enforcing Soviet nationalization of property located here. To what extent recognition or nonrecognition embodies any specific policy depends upon the particular circumstances of the case. Cf. *Russian Socialist, etc., Republic* v. *Cibrario*, 235 N. Y. 255, 263. *De jure* recognition may sometimes be withheld without hostility to the policy or principles of the unrecognized regime or without any indication of a policy against normal intercourse outside of the diplomatic sphere. See Jaffe, *Judicial Aspects of Foreign Relations*, p. 112. In such a case the Federal Government might be considered to have remained silent with respect to any question not involving the mere right of embassy. In the case of a recognized government, it may likewise appear that there is no

to the Soviet decrees because they offend against the moral principles of the forum. It is our position that the states have no such power, because a refusal to enforce the Soviet decrees on grounds of a public policy against confiscation is a hostile act and is calculated to disturb our relations with the Soviet Government. In view of the slight interest of the state in the succession to the title of assets of foreign corporate nationals located within the state, and of the very large interest of the nation in assuring that our relations with a

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relevant federal law or policy if the act of recognition, in the case of a revolution, is shown to have been intended merely for the purpose of establishing normal diplomatic relations, leaving for future negotiation other differences between the two governments, or, in the absence of a revolution, if it appears that the Federal Government has taken no position with respect to the particular act or law of the foreign government in controversy. The implications of the recognition of Russia in 1933 and the Litvinov Assignment, as a matter of executive intention, have been discussed above.

It may also be strongly argued that the maintenance of friendly relations of itself embodies a general federal policy, and that a hostile state act which is calculated to disturb friendly relations is in conflict with such general policy. It is not necessary for us to stress this view here, however, since the issue it poses to the Court is precisely the same as that discussed in the text, namely, whether the particular state action under review is a hostile act. The only difference is one of legal theory. Under the principles enunciated in the text, state action amounting to a hostile act is forbidden by the Constitution in the silence of the Federal Government; under the view that the maintenance of friendly relations of itself embodies a general federal policy, hostile state action is forbidden by the superior force of the determination of the political departments.

friendly power shall not be disturbed, we believe it clear that no discrimination against a fundamental foreign law on moral grounds may be made unless the political departments of the Federal Government determine that such discrimination does not conflict with the interests of the nation.

As this Court recently observed in *Hines* v. *Davidowitz*, 312 U. S. 52, 63, "Our system of government * * * imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference". State action "in a field which affects international relations" must therefore be "restricted to the narrowest of limits." *Id.*, at 68; *The Chinese Exclusion Case*, 130 U. S. 581, 606; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319. That the question whether the Soviet nationalization decrees shall be given effect here is one touching the conduct of our foreign relations is evident from the basic character of the decrees in the Soviet system and the vital interest of the Soviet Government in the enforcement of its fundamental laws to the full extent of their intended application. Wohl, *Nationalization of Banking Corporations in Russia* (III) (1927) 75 U. of Pa. L. Rev. 622, 638. It is equally clear that, as between the State of New York and the Federal Government, the question is primarily, if not solely, one of national concern.

As it arises in the present proceedings, the issue is the narrow one whether New York must recog-

nize the Soviet Government or its assignee as the successor to the assets in New York remaining after the payment of all enforceable claims. If the normal rules of the New York law of conflicts had been applied, the Soviet right of succession would have been recognized (see pp. 67–68, *infra*). In denying this right the court below discriminated in its application of foreign law because of a local policy against confiscation. The validity of this discrimination must be rested either on the right of the state to protect its own institutions against subversive acts by withholding the benefits of property here from a foreign revolutionary government (cf. *Russian Socialist etc. Republics* v. *Cibrario*, 235 N. Y. 255, 263) or on the moral right of any state to refuse to assist in the enforcement of laws founded on principles abhorrent to the local forum. Cf. *Griffin* v. *McCoach*, 313 U. S. 498. The court below did not place its decision on the first ground and it could not rationally have done so since any recovery is to be used for the settlement of American claims and there is therefore no possibility that it will be used to promote subversive activities. The moral basis is equally insufficient.

This Court has held that the courts of this country may not sit in judgment on the acts of a foreign sovereign done within its own territory. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *Ricaud* v. *American Metal Co.*, 246 U. S. 304. In the *Oetjen* case the ruling was that a title acquired under an act of confiscation abroad could not be

successfully challenged "by this or any other American court" when the property was brought within the custody of a local court. 246 U. S. at 304. The Court concluded that, in accordance with the principle that "every sovereign state is bound to respect the independence of every other sovereign state" (*Underhill* v. *Hernandez,* 168 U. S. 250, 253), no court of this country, state or federal, could examine into the validity of the act of confiscation and that any remedy must be found in the courts of the foreign sovereign "or through the diplomatic agencies of the political department of our Government." 246 U. S. at 303, 304. The Court further stated (246 U. S. at 303–304):

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. *To permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly "imperil the amicable relations between governments and vex the peace of nations."* [Italics supplied.]

While the objection to the act of confiscation in the *Oetjen* case was based on a supposed rule of international law (246 U. S. at 304), the doctrine announced is fully applicable where the foreign law is attacked on grounds of local public policy. Cf. *A. M. Luther* v. *James Sagor & Co.* [1921], 3 K. B. 532, 558 (C. A.); *Dougherty* v. *Equitable Life Assur. Co.*, 266 N. Y. 71, 85, 90. On this point the Court was apparently unanimous in the *Belmont* case. See 301 U. S. at 333.[17]

The suggestion in the opinion below (280 N. Y. at 311) that the doctrine of the *Oetjen* case has no application to property in the "custody" of a state and located outside the territorial limits of the foreign sovereign is without foundation. As a matter of conflicts of laws, the rule which denies effect to foreign laws, otherwise applicable, upon grounds of local public policy extends to acts of a foreign sovereign in respect of property within such sovereign's own territory as well as to those

[17] As Lord Justice Scrutton said in *Luther* v. *Sagor* [1921], 3 K. B. 532, 558–559 (C. A.): "* * * But it appears a serious breach of international comity, if a state is recognized as a sovereign independent state, to postulate that its legislation is 'contrary to essential principles of justice and morality.' Such an allegation might well with a susceptible foreign government become a casus belli; and should in my view be the action of the Sovereign through his ministers, and not of the judges in reference to a state which their Sovereign had recognized. * * *. The responsibility for recognition or non-recognition with the consequences of each rests on the political advisers of the Sovereign and not on the judges."

purporting to reach property of its nationals having a situs outside its territorial jurisdiction. *Dougherty* v. *Equitable Life Assur. Co.*, 266 N. Y. 71, 90; cf. *Griffin* v. *McCoach*, 313 U. S. 498. The rule of the *Oetjen* case must thus be rested on the broad ground that for the courts of one country to pass judgment on the decrees of a foreign sovereign would tend to disturb the peace of the nations.

In this view, the reach of the rule in the *Oetjen* case cannot be made to depend upon the situs of the property affected by the decrees. To pass judgment on the foreign law may well be considered by the foreign government as much a hostile interference in its internal affairs where the property involved is located here as where it is located abroad. There can be little question, particularly in the light of current events, that discriminatory non-intercourse, diplomatic, economic and even judicial, is apt to be regarded by the disfavored nation as a hostile sanction similar to armed intervention.[18] The rights of external sovereignty incident to recognition and the privileges of access to world trade and of comity in foreign courts are vital to the welfare of every nation. Even the non-discriminatory denial of such rights or privileges may be

[18] In the exchange of communications preceding the recognition of the Soviet Government in 1933, the Soviet Government agreed "that it will waive any and all claims of whatsoever character arising out of activities of military forces of the United States in Siberia, or assistance to military forces in Siberia, subsequent to January 1, 1918 * * *."

a matter of grave concern to foreign powers. Cf. *Chy Lung* v. *Freeman*, 92 U. S. 275, 279 (immigration). Where the denial is discriminatory and is based on disapproval of the fundamental policy of a particular foreign power, the danger that it will be regarded as a hostile act is clear.[19] See *A. M. Luther* v. *James Sagor & Co.*, note 17, p. 50, *supra*.

The Constitution forbids the states to create difficulties with foreign powers for which the nation as a whole will be held to answer. It was in this view that the Federal Government was granted exclusive power to conduct our foreign relations. *Hines* v. *Davidowitz*, 312 U. S. at 63–64; *Chy Lung* v. *Freeman*, 92 U. S. 275, 279–280;

[19] This is manifestly so of diplomatic non-recognition based on opposition to the political, social and economic principles of the unrecognized regime. See Jaffe, *Judicial Aspects of Foreign Relations*, p. 111; Borchard, *The Unrecognized Government in American Courts* (1932), 26 Am. J. Int. L. 261. The same may be true of the regulation of exports discriminating among nations on the basis of their foreign policy. And, in view of the importance of access to foreign courts for the protection of commerce and property interests abroad, the discriminatory withholding of the right to sue or the discriminatory denial of effect to fundamental foreign law on grounds of public policy must be deemed to stand on the same footing. In at least one instance, in the case of negotiations concerning a commercial treaty between the French Government and Soviet representatives prior to *de jure* recognition, a refusal of the French Tribunal de la Seine to apply the Soviet nationalization decrees upon grounds of public policy apparently resulted in the termination of the negotiations and the departure of the Soviet representatives. See Wohl, *Nationalization of Banking Corporations in Russia*, III, (1927) 75 U. of Pa. L. Rev. 622, 638.

The Federalist Papers, Nos. 3, 80. Even non-discriminatory state regulation of the admission of aliens has therefore been condemned by this Court because of the danger of a grave disturbance of our relations with foreign powers, notwithstanding the admitted interest of the states in the character and responsibility of aliens admitted to a local port. *Henderson* v. *Mayor of New York*, 92 U. S. 259, 273–274; *Chy Lung* v. *Freeman*, 92 U. S. 275, 279–280. The discriminatory refusal of a state to give effect to a foreign act of confiscation can have no greater validity. Such a discrimination is no less likely to disturb our friendly relations with a foreign power and the interest of the state is even more remote.[20] This is the conclusion required by this Court's decision in the *Oetjen* case where the property involved was located abroad. As we have shown, the danger of disturbing friendly relations is no less where the property is located here.[21]

[20] As previously observed (*supra*, p. 46n), this result may also be rested on the ground that hostile state action is in conflict with the general policy of the Federal Government reflected in the maintenance of friendly relations with the Soviet Government. Cf. *Kennett* v. *Chambers*, 14 How. 38.

[21] The decision below cannot be supported on the ground that an assertion of sovereignty beyond the territorial limits of the sovereign is never given effect abroad. Cf. Wohl, *Nationalization of Banking Corporations in Russia*, III (1927), 75 U. of Pa. L. Rev. 622, 626, 634–637. The court below did not place its decision upon any such general principle, a principle which would apply with equal force to the recent decrees of the Dutch, Belgian, and other governments

The controlling principle is that the Constitution forbids the states to take hostile action against a foreign power without the consent of the Federal Government. The reach of the prohibition is measured accordingly. Where the states, by reason of some significant contact with the subject matter of the proceedings, have uniformly applied their own internal law to the exclusion of the law of other states having some contact with the matter involved, regardless of the content of the foreign law, it probably would not be a hostile act to apply the local internal law to the exclusion of the foreign law. And, since the question whether it is a hostile act to refuse to apply the foreign law depends on the interest of the foreign state in the enforcement of the law, a distinction may possibly be drawn between the discriminatory denial of effect to a "private" foreign law and the non-recognition of an act of state or fundamental law, the enforcement of which is of manifest concern to the foreign sovereign. But where, as here, the only local interest is opposition on grounds of public policy to the fundamental law of a foreign power, and where the sole contact of the state is jurisdiction over the property involved, the discriminatory refusal to give effect to

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in exile nationalizing assets of their nationals in this country in connection with the prosecution of the war. Cf. *Anderson* v. *N. V. Transandine Handelmaatschappij*, 28 N. Y. Supp. (2d) 547. The decision below discriminates against the Soviet decrees solely upon the ground of a local public policy against confiscation.

the foreign law must be deemed an invalid hostile act."[22]

## II

### THE DECISION BELOW CANNOT BE RESTED UPON ADEQUATE NON-FEDERAL GROUNDS

Respondent urges (Br. in Opp. pp. 10-11 —) that this Court may not decide the federal question discussed in the preceding point because the decision below can be supported on either of two non-federal grounds: (1) that the Soviet decrees were not

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[22] The decisions as to the right of the state of the forum to refuse effect on grounds of local policy to the laws of another state even where the forum has little or no contact with the transaction in controversy (cf. *Griffin* v. *McCoach*, 313 U. S. 498; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 110) have no bearing on the power of the states to make a hostile discrimination against the basic laws of a foreign power. Cf. *Oetjen* v. *Central Leather Co.*, *supra*.

Even if it be held that the states have power to refuse to enforce foreign laws abhorrent to the forum, the principle that, in matters touching the conduct of our foreign relations, state action must be "restricted to the narrowest of limits" (*Hines* v. *Davidowitz*, 312 U. S. 52, 68) would require that the state action be limited to a denial of jurisdiction of the state courts. Cf. *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 106, 110, 112. The United States would thus be free to sue in the federal courts, since a state restriction on the jurisdiction of the state courts is not binding on the federal courts. Decisions which cast doubt on the validity of the suggested distinction between a denial of jurisdiction and a binding determination on the merits where the enforcement of the law of a sister state is involved (cf. *Pacific Ins. Co.* v. *Commissioner*, 306 U. S. 493, 504 with *Bradford Elec. Co.* v. *Clapper*, 286 U. S. 145, 160) are irrelevant since they do not involve state action touching the conduct of foreign relations. Cf. *Oetjen* v. *Central Leather Co.*, *supra*.

intended to cover the assets of Russian insurance companies located in this country; and (2) that the New York branch of the Insurance Company was, under New York law, a separate juristic entity with title to the local assets and that succession to its surplus funds is therefore governed by the New York and not the Russian law of succession. We show in Point III that no issue with respect to the scope of the Soviet decrees was raised by respondent or decided by the court below and that the decision may not, therefore, be rested on that ground. In this section of the brief we discuss the other alleged non-federal ground of decision.

Approach to the question is complicated by the confused reasoning of the *Moscow* opinion. Analysis of the opinion demonstrates clearly enough, however, that, despite the discussion of the separate juristic entity of the New York branch of the Insurance Company, upon which respondent relies for his contention, the basis of the decision was intended to be and must have been (*supra*, p. ——), the view that the Soviet decrees, because of their confiscatory character, are contrary to the local public policy. No other interpretation adequately explains the conclusion reached. And, under any other construction of the opinion, the decision would be so palpably without basis in New York law as to require invocation of the rule that, where a federal right is asserted, neither plainly unten-

able non-federal grounds (*Postal Tel. Cable Co.* v. *Newport*, 247 U. S. 464, 475; *Enterprise Irrig. Dist.* v. *Farmers' Mut. Canal Co.*, 243 U. S. 157, 164; *Ward* v. *Board of County Comm'rs of Love County*, 253 U. S. 17, 22; *Ancient Egyptian Order* v. *Michaux*, 279 U. S. 737, 745, 749) nor any cloak or pretext to evade the federal claim (*Vandalia Railroad* v. *Indiana ex rel. South Bend*, 207 U. S. 359, 367; *Leathe* v. *Thomas*, 207 U. S. 93, 99; *Davis* v. *Wechsler*, 263 U. S. 22, 24; *Fox River Paper Co.* v. *Railroad Commission*, 274 U. S. 651, 655; *McCoy* v. *Shaw*, 277 U. S. 302, 303–304) can preclude this Court from deciding the federal question.

A. THE DECISION BELOW WAS IN EXPRESS TERMS BASED ON THE GROUND THAT ENFORCEMENT OF THE SOVIET DECREES IS CONTRARY TO NEW YORK PUBLIC POLICY AGAINST CONFISCATION.

As the court below held, the New York branch of the First Russian Insurance Company, whatever its juristic character, has been liquidated and has "ceased to exist" (280 N. Y. at 310). The court held that in these circumstances the First Russian Insurance Company, but for its dissolution, would have had "residual rights" to the surplus assets of the New York branch (*id.*, 314). It was in this view that the court below, prior to the recognition of the Soviet Government, directed that surplus funds remaining after the payment of creditors should be paid over to the directors of the "parent" corporation. *Matter of*

*People (Russian Reinsurance Co.: First Russian Ins. Co.)*, 255 N. Y. 415. The court further recognized that, as a matter of New York conflict of laws, the succession to the rights of foreign corporations is ordinarily governed by the law of the domicile. Thus, the court stated that the surplus funds of the New York branch of a foreign insurance company would ordinarily be transmitted to the corporation at its domicile or to its domiciliary liquidator or administrator (*id.*, 299, 310). The issue confronting the court in this case, therefore, was whether the ordinary rules of the New York law of conflicts should be applied or whether, on the other hand, the Soviet decrees establishing the Soviet Government as successor to the Insurance Company under the law of the domicile should be denied effect because of their confiscatory character.

The starting point and basic premise of the decision below was that a question of conflicts or choice of law is one of local law. In this view, the court below held that the question whether the Soviet decrees, if intended to reach the property in controversy, should be given that effect in the courts of New York, is one of New York law (*id.*, 303). The court recognized that, under the doctrine of *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, "the courts of one [state] will not sit in judgment on the acts of the government of another, done within its own territory" (*id.*, 303), and, apparently, that the courts of New York should therefore give effect to the Soviet decrees with

respect to property or transactions in Russia (*id.*, 305). The rule of the *Oetjen* case was considered inapplicable, however, to assets outside of Russia and beyond the territorial jurisdiction of the Soviet Government (*id.*, 308, 311). The court also recognized that, under the decision of this Court in *United States* v. *Belmont*, 301 U. S. 324, "when judicial authority is invoked in aid of" consummation of a treaty or executive agreement, "state constitutions, state laws, and state policies are irrelevant to the inquiry and decision" (*id.*, 303). Relying on *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, however, it held that the Litvinov Assignment merely empowered the United States to "collect the claims in conformity to local law" (*id.*, 304), and, as already stated, the question whether the Soviet decrees were to be given effect was considered a question of local law (*id.*, 303, 304). The *Belmont* case was distinguished on the ground that it arose on a demurrer which the Court of Appeals thought admitted the confiscation, whereas the very question which the court had to decide in the instant case was whether the title had been transferred *in invitum* from its owner to the Soviet Government (*id.*, 309).[23]

Accepting these "general principles" as "established premises" (*id.*, 302, 304), the court sought to demonstrate that, by reason of the state's com-

[23] The instant case, it may be noted parenthetically, is the same as the *Belmont* case in this respect.

plete control of the funds in controversy, the funds were beyond the jurisdiction of the Soviet Government and the state was therefore free to determine whether or not to give effect to the Soviet decrees in accordance with "its own public policy" (*id.*, 303). Without determining whether this was true with respect to all property located in New York, the court held that this was the rule in the circumstances of this case. It based this conclusion upon the grounds that the local branch of the insurance company was a "complete and separate organization" (*id.*, 310), that its assets have constituted "a capital corresponding to that of domestic corporations" (*id.*, 309), that the "legal" title to the funds have always been held by a local trustee (*id.*, 308) and that the funds have always been subject to the control of the New York Insurance Department and "in a practical sense has always been in the custody of the State" (*id.*, 308, 310, 313).[24]

It is important to observe that what was said as to the separate legal personality of the local branch and the "legal" title of the local trustees was not intended to contradict the further holding of the court below that the residual equity in the surplus funds belonged to the Russian corporation

[24] These considerations were discussed in the *Moscow* opinion both on the question whether the Soviet decrees were "intended" to reach the assets involved and on the question "whether, if so intended, the courts of this State would give the decrees such effect" (280 N. Y. at 307).

after the local branch "ceased to exist". Nor did the court, in holding that local law was controlling, purport to overrule its prior decisions (see *infra*, pp. 67–68) that the succession to the residual right of a foreign insurance corporation is normally governed by the law of its domicile; the court made it clear that it meant to include in the local law not merely the internal law of New York as to succession but also such foreign law as by the local law of conflicts is applied in the courts of New York. Thus the court expressly recognized that the surplus funds would normally be transmitted to the domiciliary receiver (*id.*, 299, 310) and also that all claims of foreign claimants might "under our law" be retroactively destroyed by the Soviet decrees (*id.*, 312). The sole relevance of the separate entity theory, as the opinion expressly reveals, was to demonstrate that the doctrine of the *Oetjen* case did not forbid the court to pass judgment on the foreign decrees in this situation and that it was therefore free to apply or not apply the foreign law in accordance with local principles of justice (*id.*, 311).

The court then proceeded to deny effect to the decrees upon the sole ground that they were contrary to a New York policy against confiscation. The consideration of the effect of such decrees, it declared, was "not an agreeable task" to a court which administers law based on the "principles

and traditions of the common law" (*id.*, 311).[25] Even so, it would give effect to such decrees to the extent required by the principle that the courts of one state may not sit in judgment on the acts of another government done within its own territory (*id.*, 311). But where, as here, there is "room for choice" by reason of local custody and control, it would be "guided by common law principles and traditions embodied in our Constitution, statutes and judicial decisions" (*id.*, 311–312). Guided by such considerations, the court declined to give effect to the Soviet decrees. One reason assigned for this conclusion was that it had previously invited foreign claimants to prove their claims (*id.*, 312, 313). Even this consideration involved a weighing of relative equities in the light of a local policy against confiscation. But the equity of other claims was not an independent or controlling ground of decision, for the court expressly assumed that it might subsequently be decided that the claims of foreign creditors were all effectively extinguished by the Soviet decrees (*id.*, 313). This question the court found it

[25] The Court observed: "It was said by Viscount CAVE in *Russian Commercial & Industrial Bank* v. *Comptoir d'Escompte de Mulhouse* (*supra*) that 'it is not an agreeable task for a British Court of Justice to consider the effect of a series of decrees and orders providing for the compulsory acquisition by a foreign State of the assets of private persons on the basis of complete confiscation'" (p. 123). It is no more agreeable to an American court which administers law based on the same principles and traditions of the common law." (280 N. Y. at 311.)

unnecessary to pass upon in this case for the reason that the claim of the United States, considered alone, was invalid. "We review the validity of the claim of the United States; defects in the claim of others would not cure invalidity there" (*id.*, 313). It was in this view that the court denied the Government any standing to contest the validity of other claims (*id.*, 312–313).

In brief, the court refused to give effect to the Soviet nationalization decrees even on the assumption that all foreign claimants, creditors and stockholders, might have no equity and the invalidation of the Government's claim might therefore result in an escheat of the surplus funds to the State of New York. It reached this conclusion, not because the "parent" corporation was without any interest in the funds, nor because the courts of New York apply the local law rather than that of the domicile in all cases of succession to such assets (*id.*, 299, 313), but because the content of the foreign law in this case was repugnant to a local public policy against confiscation. In preferring the claims of foreign claimants to that of the Soviet Government, "the courts below have made the proper choice", the court said in conclusion, "not because enforcement of *confiscatory* decrees of property *situated elsewhere* is contrary to our public policy, but because under the law of this State such *confiscatory decrees* do not affect the *property claimed here*" (*id.*, 314; italics supplied).

The theory of the decision gains added clarity when the opinion is read against the background of prior decisions on the question of the extra-territorial effect of the Soviet decrees after recognition. In *Vladhavkazsky Ry. Co.* v. *New York Trust Co.*, 263 N. Y. 369, 378, an action by a railroad corporation, organized under the old regime in Russia, to recover a sum of money deposited in a New York bank, the court below held that the Soviet nationalization decrees would not be applied to a claim on a debt owing in New York upon grounds of local public policy. Following the decision of this court in *United States* v. *Belmont*, 301 U. S. 324, however, the court below, in *United States* v. *Manhattan Co.*, 276 N. Y. 396, a case identical in all respects with the instant case, unanimously held that it was bound to recognize the United States as successor to the interest of a Russian insurance company in the local surplus funds. Subsequent to the decision in the *Manhattan* case and prior to that in the *Moscow* case, this Court rendered its decision in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 143, and in the course of its opinion, declared that the only right acquired under the Litvinov Assignment was one to collect the claims "in conformity to local law". Thereafter in the *Moscow* case, the court below, ignoring the distinction between the validity of the Soviet claims regardless of ownership and the validity of the nationalization of the claims, and viewing the question of choice of law as wholly one of local law,

considered itself free to deny effect to the Soviet decrees upon grounds of a local public policy against confiscation.

The difference in result in the *Manhattan Co.* case, on the one hand, and in the *Moscow* case and the present one on the other, is explicable, not by reason of any change in New York law, but solely on the ground that the court interpreted the intervening *Guaranty* case as permitting it to apply its own public policy with respect to the Soviet decrees in making its choice of law. Any other construction of the *Moscow* opinion leaves unexplained the unanimous holding in the *Manhattan Co.* case—a holding which, as a matter of substantive New York law, the *Moscow* decision does not purport either to overrule or restrict.

B. THE CONCLUSION REACHED BY THE COURT BELOW CANNOT BE EXPLAINED UPON THE GROUND THAT, UNDER NEW YORK LAW, THE LOCAL BRANCH WAS A SEPARATE JURISTIC ENTITY AND THAT SUCCESSION TO ITS SURPLUS FUNDS IS THEREFORE GOVERNED BY THE NEW YORK AND NOT THE SOVIET LAW OF SUCCESSION

Respondent contends that the decision below was based upon a holding that, under New York law, the local branch of the Insurance Company was a separate juristic entity and that the succession to its assets is therefore governed by the New York rather than the Soviet law of succession. A sufficient answer is that, as we have shown above, the decision was expressly based on the sole ground of the local public policy against confiscation. A further answer is that respondent's

theory does not provide an intelligible rationale of the decision and therefore could not have been intended as the basis of the court's holding.

We may assume for purposes of the present argument that the court below did hold that the New York branch of the First Russian Insurance Company was a separate juristic entity with title to its assets. Even on this assumption, however, there must still be some person or persons entitled to the surplus funds of that entity after it has ceased to exist and all valid claims have been paid. The very issue confronting the court below was the determination of the person or persons to whom this "residual right" belonged. Indeed, the court specifically recognized in its holding, already adverted to, that if the "parent" Russian company had continued to exist, it would have been entitled to the surplus funds. 280 N. Y. at 299, 310, 314.

It is entirely apparent, therefore, that acceptance of the concept that the local branch of a foreign insurance company is a separate juristic entity does not, under New York law, preclude the existence of a residual right in the "parent" company. And, since the United States claims as successor to the residual right of the "parent" company, it is equally obvious that its claim may not be denied on the bare ground that the New York branch had been a separate entity to which the assets had belonged prior to the dissolution of the branch. In order to support the decision on the theory which he advocates, there-

fore, respondent must show, not only that the local branch is a separate entity, but also that, upon dissolution of the "parent" company, the New York law does not, as a matter of its normal conflict of laws, recognize the succession to the residual rights of the "parent" company established by the law of its domicile.

Nothing in the *Moscow* opinion in any way suggests that the court below intended to enunciate this proposition. And it is directly opposed to the long and firmly established principle of the New York law of conflicts that foreign law alone determines whether a foreign corporation, including a foreign insurance corporation, has been dissolved and, if dissolved, who is entitled to be recognized as successor to its rights. *Russian Reinsurance Company* v. *Stoddard*, 240 N. Y. 149, 154–155, 167; *Dougherty* v. *Equitable Life Assurance Soc.*, 266 N. Y. 71; *Kosolapoff* v. *P. M. K. Bank*, 276 N. Y. 499; *Murray* v. *Vanderbilt*, 39 Barbour 140, 146 (N. Y. 1863); *Matter of National Surety Co. (Laughlin)*, 283 N. Y. 68, 76–77; *Matter of Lehrich* v. *Sixth Ave. Bancorporation, Inc.*, 251 App. Div. 391, 393–394 (1st Dept.); cf. *Issaia* v. *Russo-Asiatic Bank*, 266 N. Y. 37, 43; *Holzer* v. *Deutschereichsbahngesellschaft*, 277 N. Y. 474. Thus, New York has always given effect to the law of the domicile for the purpose of ascertaining the primary receiver, statutory liquidator, or other proper successor at the domicile. *People* v.

*Granite State Provident Assn.*, 161 N. Y. 492; *Martyne* v. *American Union Fire Ins. Co.*, 216 N. Y. 183; *Matter of Popple (Norske Lloyd Ins. Co.)*, 242 N. Y. 148, 166; *Warren Ross Lumber Co.* v. *Haniel Clark & Son, Inc.*, 211 App. Div. 591, 593 (4th Dept.); *Drury* v. *Doherty*, 127 Misc. 263, 266; 131 Misc. 642 (Sup. Ct.); cf. *Clark* v. *Williard*, 294 U. S. 211, 214–215; Restatement of Conflict of Laws, New York Annotations, Secs. 552–553, pp. 342–343.

In view of this long line of unchallenged decisions, it is manifest that the refusal of the court below to recognize the rights of succession established by Soviet law to the Insurance Company's "residual right" in the assets of the New York branch of the Company, regarded as a separate juristic entity, was based, not upon the ground that the foreign law is never applicable in determining rights of succession, but on the ground that the particular Soviet decrees here involved, because of their confiscatory character, would not be given the same effect normally attributed to foreign law. This view does not make the court's discussion of the separate entity theory gratuitous; that discussion was intended to establish, as we have already suggested (p. 61, *supra*), that, despite the ruling in the *Oetjen* case, the court was free in the circumstances of this case to pass judgment on the law of the domicile.

C. THERE IS NO BASIS IN NEW YORK LAW FOR THE CONCLUSION THAT THE LOCAL BRANCH WAS A SEPARATE JURISTIC ENTITY WITH TITLE TO THE LOCAL ASSETS

Should our analysis of the opinion below be rejected and the decision be held, on some theory, to rest upon the conclusion that the New York branch of the Insurance Company was a separate juristic entity with title to the local assets, this Court would be called upon to determine whether there is any fair and substantial basis in local law for that conclusion. It is established, of course, that where a federal right is asserted, this Court determines for itself whether the non-federal basis independently and adequately supports the judgment. *Broad River Power Co.* v. *South Carolina ex rel. Daniels*, 281 U. S. 537, 540; *id.*, 282 U. S. 187; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 773; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 282. That rule is fully applicable to this case, since the alleged non-federal ground here is palpably untenable and consequently cannot preclude this Court from deciding the federal question. See authorities cited at p. 57, *supra*.

Judge Rippey, speaking for the minority of the court below in the *Moscow* case, declared (280 N. Y. at 318):

> * * * there is no foundation in our statute law, in the decisions of our courts, in reason, logic or elsewhere for the assertion that the branch of a foreign corporation

> is a juristic, legal or factual entity, separate and distinct from the parent company, or that it may be placed in the same position as a domestic corporation as to rights and obligations and capable independently to perform corporate functions.

No other view is permissible. There is not the slightest basis for the contention that the New York Insurance Law (Consol. Laws, ch. 28) requires a divorce of ownership of the assets used in the local business and of juristic personality. To the contrary, Section 27 of the Insurance Law expressly contemplates that corporations organized "under the government or laws of any state or country outside of the United States" may be "authorized to transact the business of fire or marine or fire and marine insurance in this state, * * *." After directing that such a foreign corporation must deposit certain sums as security for the protection of all of "its" policyholders and creditors "within the United States", Section 27 proceeds to define "the capital of such a foreign insurance corporation". In the same provision, the act speaks of periodic reports required

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[20] The sections of the Insurance Law referred to in this brief are those which were in effect at the time the local branch was liquidated. The amendments which have been made since are manifestly irrelevant on the question whether the local branch was a separate legal entity. It is arguable that the only pertinent provisions are those which were in effect at the time the local branch was established, but the decision below is most favorably viewed if tested by the provisions in effect at the time of the liquidation.

by law of "such a foreign insurance corporation", and directs the Superintendent of Insurance, upon the basis of such reports or independent data, to determine the amount of "such capital" and issue a certificate with regard thereto to "such corporation". Section 27 then provides that, in the event the "capital of such a foreign insurance corporation" is reduced below the amount previously required, the Superintendent shall issue a requisition to "such corporation" through "its" United States "manager or attorney"—not, be it observed, its local domestic corporate subsidiary, which, of course, never existed and was never in the contemplation of the statute.

Next, Section 27 provides for the investment of the required deposit and in this connection speaks of "the capital of such a foreign insurance corporation" and distinguishes the "funds of such a foreign insurance corporation", which latter are not required to be deposited. Section 27 further provides that when securities or other property of "such a foreign insurance corporation" is held by trustees, the trustees shall be appointed by "the board of managers or directors of such corporation". Every other reference in the section expressly recognizes that the local branch is a part of and not a juristic entity separate from the "foreign" corporation, and expressly distinguishes "foreign" and "domestic" corporations doing business in New York. See Appendix B, p. 124, *infra*.

The distinction between a "domestic" insurance corporation and the local branch of a "foreign" insurance corporation doing business within the state is similarly recognized in all the other pertinent provisions of the Insurance Law. See, *e. g.*, Section 10 (requirements for certificate of authority to transact business); Section 13 (class of securities to be deposited); Section 30 (appointment of Superintendent of Insurance as attorney for service of process on foreign corporations); Section 33 (reciprocal requirements for New York corporations doing insurance business abroad); Section 41 (assessment on stockholders or revocation of license in event of impairment of capital); Section 46 (verification of reports); Section 45 (reports of "assets" of foreign insurance corporations to include statement of assets held "by it or for it" within the United States and not of "its" assets elsewhere unless the Superintendent requires additional information as to "its" total business or any portion thereof); Section 52 (amendment of charter of insurance corporations).

The difference in the powers conferred on the Superintendent where liquidation proceedings are ordered is particularly significant. In the case of a domestic corporation, the Superintendent is vested with title to all the property, contracts and rights of action of the corporation and may deal with all such interests in his own name as Superintendent (Section 63 (3)). In the case of a foreign corporation, however, the Superintendent

is merely directed to take "possession" of the property and "conserve" the assets and is given only such rights and duties with reference to the corporation and its assets as were "heretofore exercised and imposed upon ancillary receivers of foreign corporations in this State" (Section 63 (4)). It may be noted that a chancery receiver in New York has no title to the assets in the absence of statute[27] and that no New York statute confers such title upon an ancillary receiver of a foreign corporation. In view of these provisions of Section 63, it is clear that New York expressly undertook, in the case of domestic insurance corporations, to appoint the statutory successor and to vest him with title to the assets, while in the case of foreign corporations it refrained from doing so. The distinction is an express recognition that, in accordance with universally accepted principle, the appointment of such a successor is the business of the state or country of domicile.[28]

[27] See *Herring* v. *New York, L. E. & W. R. R. Co.*, 105 N. Y. 340, 372–373; *Stokes* v. *Huffman House*, 167 N. Y. 554, 559–560; *Rinehart* v. *Hasco Bldg. Co.*, 153 App. Div. 153 (1st Dept.), affirmed without opinion, 214 N. Y. 635; Clark, *Receivers* (2d ed.), Vol. 1, p. 20.

[28] The fact that the United States branches were not separate organizations for anything other than the limited purpose of protecting domestic creditors was made clear by the practice of the New York Insurance Department under which United States branches of foreign insurance companies, unlike domestic companies, were not permitted to invest any of their assets in the capital stock of American fire insurance companies (Departmental Ruling, November 24, 1923), and were not permitted to transact business outside

The argument that the Insurance Law seeks to give local claimants the same protection, and the Superintendent of Insurance the same regulatory power, in the case of foreign insurance companies as in the case of domestic companies leads nowhere. As appears from its express language, the statute manifests the purpose of accomplishing this result without a legal divorce of ownership of assets or of juristic personality.

This conclusion is not only compelled by the statutory language but, at least until the *Moscow* decision, it was the settled law of New York. *Matter of People* (*Second Russian Ins. Co.*), 256 N. Y. 177, 181; *Matter of People* (*Northern Ins. Co.*), 255 N. Y. 433; *Matter of People* (*Russian Reinsurance Co.*), 253 N. Y. 415; *Matter of People* (*Norske Lloyd Ins. Co.*), 249 N. Y. 139; *James & Co.* v. *Russia Ins. Co.*, 247 N. Y. 262; *Matter of People* (*Norske Lloyd Ins. Co.*), 242 N. Y. 148, 159; *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248; *Matter of People* (*City Equitable Fire Ins. Co.*), 238 N. Y. 147; *Matter of People* (*Second Russian Ins. Co.*), 244 N. Y. 606, dismissing appeal from 219 App. Div. 46; cf. *Lancashire Ins. Co.* v. *Maxwell*, 131 N. Y. 286, 290–291.

The first *Norske Lloyd* case, 242 N. Y. 148, the sole authority relied upon by the court below for

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the United States (Departmental Ruling, July 7, 1920). Copies of these Departmental Rulings are printed in the Appendix to the Brief for the United States in *United States* v. *Moscow Fire Insurance Company*, No. 355, October Term, 1939, pp. 139–140.

the view that the local branch of a foreign insurance company is a separate domestic entity, holds exactly the contrary. The question presented in that case was whether the funds deposited by a foreign insurance company with the Superintendent of Insurance for the benefit of local claimants were available to local claimants holding insurance policies issued by the insurance company abroad or only to holders of policies issued in the United States. The court held that the funds were available only to holders of policies issued in the United States on the ground that the purpose of the deposit was to provide security only for the domestic business of the company. In this connection the court observed that the local branch was intended to be treated as a separate organization for purposes of assets and regulation. The court expressly stated, however, that the corporation was a "foreign corporation" (242 N. Y. at 154, 159), it made specific reference to certain differences in the regulatory provisions in respect of "domestic" and "foreign" corporations (*id.*, 160, 161–162), it recognized the receiver appointed at the foreign domicile as the "domiciliary" receiver (*id.*, 164, 166), and accordingly it directed the transmission of the surplus funds to the foreign receiver.[29]

[29] The same view was expressed by the Court of Appeals when the Norske Lloyd Insurance Company's liquidation came before it for a second time. *Matter of People* (*Norske*

Indeed, the very assumption on which the Court of Appeals has proceeded in directing the Superintendent of Insurance with respect to the disposition of the funds of nationalized Russian insurance companies doing business in New York, is that the New York branches of the companies were distinct and separate only to the extent necessary for the protection of domestic creditors. *Matter of People* (*Russian Reinsurance Co.: First Russian Ins. Co.*), 255 N. Y. 415. The court

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*Lloyd Insurance Co.*), 249 N. Y. 139. That case involved the question whether domestic creditors were to be allowed interest on their claims during the period of liquidation. Answering protests on behalf of foreign creditors to the effect that the allowance of interest would even further diminish the dividend which they would receive on their claims, the Court of Appeals, speaking through Lehman, J., said (p. 149): "Creditors who have dealt with the insurance company here have more than a preference in the distribution of the proceeds of the assets of the corporation on liquidation, or even than a specific lien upon the assets. They are the only claimants who are entitled to share in that distribution. They are the only persons who on liquidation may be regarded in some sense as the equitable owners of the fund in liquidation. All others must look for satisfaction of their claims to the domiciliary representative of the foreign company and not to the fund here."

Chief Judge Cardozo stated (p. 427): "The State of New York is not charged with a duty to wind up the business of these Russian corporations. In aid of domestic creditors, it winds up a branch of such a business conducted within its borders and in submission to its laws (*Matter of People* (*Norske Lloyd Ins. Co.*), 242 N. Y. 148). This done, its duty ends, except to turn the surplus over to a competent custodian (Insurance Law sec. 63). * * * *The surplus assets in this State are but a part of the total assets to be administered abroad. We disclaim a continuing duty of*

held in that case that, after the payment of domestic creditors and foreign creditors with valid attachments and executions, the Superintendent should turn over any surplus funds to the directors of the Russian corporations, which were considered not to be dissolved in the absence of diplomatic recognition, so that foreign creditors might pursue any available remedies. The court emphasized its view that the local branches were not separate domestic entities by its express declaration that the Superintendent of Insurance exercised the powers of "ancillary receivers of foreign corporations", as provided in Section 63 of the Insurance Law.

It may be observed, finally, that a decision that the surplus funds were the property of a separate New York entity cannot be reconciled with the holding that foreign creditors having claims based on transactions with the "parent" corporation or with other branches have a right to be satisfied out of the assets of the local branch. For if the United States branch is a separate corporation, such that the title of the United States cannot be recognized because it derives from the parent, then the claims of foreign creditors equally based on transactions with the parent or with other branches cannot be deemed claims which the local branch is obligated to satisfy.

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*visitation and supervision.* * * * Our administrative machinery should be no longer clogged, our liquidator no longer burdened, our courts no longer vexed, with problems not our own." [Italics supplied.]

## III

NO ISSUE WITH RESPECT TO THE SCOPE OF THE SOVIET DECREES WAS RAISED BY RESPONDENT OR DECIDED BY THE COURT BELOW

The complaint in the present case alleges that the effect of the Soviet decrees, as a matter of Russian law, was to nationalize the assets of the Insurance Company, wherever situated, including the New York assets now in controversy (R. 23–24). Although the complaint was dismissed on motion and without a trial, respondent contends that the decision below was based in part on a finding of fact, contrary to the allegations of the complaint, that the Soviet decrees were not intended to reach the New York assets and that this is an adequate and independent non-federal ground (Br. in Opp., p. 10).

The basis of the contention is that the court below in the *Moscow* case sustained the referee's finding of fact, entered after a hearing on the issue, that the Soviet decrees were not intended to reach the New York assets. Respondent argues that, since the present case was decided upon the authority of the *Moscow* case, this finding of fact must also be deemed to be one of the grounds of decision here. In support of this contention, it is urged that respondent's motion for summary judgment in the present case was based upon the official record in the *Moscow* case, showing the

facts in the two cases to be identical (Br. in Opp., pp. 7–8).

The argument is without substance. The *per curiam* opinion in the present case reveals on its face that the only questions considered were the questions of law decided in the *Moscow* case. The opinion declares that "this court should, in determining title to assets of First Russian Insurance Company, deposited in this State, apply in this case the *same rules of law* which the court applied in the earlier case in determining title to the assets of Moscow Fire Insurance Company deposited here" (R. 71–72; italics supplied). That the court considered the question of the intended effect of Soviet law as one of fact and not of law is clear from the *Moscow* opinion, where the referee's determination of this issue was sustained on the ground that it was a finding of fact supported by substantial evidence. 280 N. Y. at 306, 310.

There are other considerations which compel the conclusion that the court below did not pass upon the issue of the scope of the Soviet decrees. The respondent did not raise this issue for purposes of the motion. Indeed, it is extremely doubtful under New York law whether he could have raised the issue on the actual pleadings filed. That the court below did not decide this question of practice is shown by the fact that the sole authority for its decision was the *Moscow* case, in which the ques-

tion was not involved. In view of the substantial doubt that respondent was entitled to raise the issue on the pleadings, the court below would certainly not have decided the point in respondent's favor without some explanation.

Respondent moved "pursuant to Rule 113 of the Rules of Civil Practice and Section 476 of the Civil Practice Act, on the ground that there is no merit to the action, and that it is insufficient in law." (R. 10). Section 476 provides for the entry of judgment on the pleadings or admissions of the parties, and allows what may be considered a type of demurrer after answer. Except where admissions of the parties are involved, no issue of fact may be raised or resolved, affidavits and documents are inadmissible, and the court may decide only questions of law. *Lefler* v. *Clark*, 247 App. Div. 402, 404 (1st Dept.); *Kibbe* v. *City of Rochester*, 57 F. (2d) 542, 543 (W. D. N. Y.); *Jongers* v. *First Trust & Deposit Co.*, 147 Misc. 260, 261 (Sup. Ct.).

Rule 113, providing for summary judgment in specified cases, does permit the raising and decision of certain issues of fact, but it is clear that respondent raised no such issue, and the state courts decided none. Respondent's sole supporting affidavit expressly states (R. 13):

> *There is no dispute as to the facts.* The complaint alleges and the verified answer admits the facts concerning the history of

> the organization of the United States Branch of the First Russian Insurance Company established in 1827 and the facts concerning the proceedings and litigations involving the said company since its admission to do business in the State of New York in 1907. *The verified answer merely denies certain conclusions of law in the complaint* and sets forth six separate defenses to the plaintiff's cause of action. *These defenses need not now be considered for the complaint standing alone is insufficient in law and must be dismissed.* [Italics supplied.]

The last paragraph of the affidavit begins with the phrase: "There being no issues of fact to be tried * * *" (R. 17), and there is no reference whatever to the voluminous testimony and evidence on the Soviet law included in the record in the *Moscow* case, or to the issue of the meaning and scope of the Soviet nationalization decrees. That issue had been expressly raised by the third and fourth affirmative defenses (R. 46–47) which the supporting affidavit declared "need not now be considered" (R. 13).

It is evident, therefore, that the motion did not present any specific issue concerning the proper construction of the Soviet decrees. This being so, it is settled that the general allegations of the complaint with respect to the foreign law must be deemed admitted for purposes of the motion.

*Hanna* v. *Lichtenhein*, 255 N. Y. 579; *Pope* v. *Heckscher*, 266 N. Y. 114, 117; *Moscow Fire Ins. Co.* v. *Bank of New York*, 280 N. Y. 286, 309.

Moreover, under New York practice, the particular issue of the construction of the Russian law could not properly have been presented by the motion for summary judgment. The only provision of Rule 113 which might have been available to respondent,[31] and upon which respondent now relies (Br. in Opp., pp. 8–9), is contained in the fifth paragraph, authorizing summary judgment "where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record." Respondent contends that the testimony and evidence introduced in the *Moscow* case represent such "documentary evidence or official record." But this paragraph of Rule 113 manifestly contemplates a case where the document or official record is in itself non-testimonial proof of the defense asserted, such as

[31] It is settled that the first five subdivisions of Rule 113 do not apply to equitable actions to determine the title to a fund. *103 Park Avenue Co.* v. *Exchange Buffet Corp.*, 203 App. Div. 739 (1st Dept.); *Newark Fire Ins. Co.* v. *Grill*, 251 App. Div. 399 (1st Dept.); *Albertson* v. *Fidelity and Deposit Co.*, 253 App. Div. 801 (1st Dept.); *Fiscella* v. *Fridman*, 169 Misc. 327 (Sup. Ct.); cf. *Lederer* v. *Wise Shoe Co.*, 276 N. Y. 459, 463. Subdivisions 6, 7, and 8 of Rule 113 are patently inapplicable upon their face.

a release, decree of a bankruptcy court, or license. See, e. g., *Lederer* v. *Wise Shoe Co.* 276 N. Y. 459 (decrees of bankruptcy court); *Wels* v. *Rubin*, 254 App. Div. 484 (1st Dept.), reversed on other grounds 280 N. Y. 233 (alleged libel contained in document submitted to court); *Sweet* v. *Campbell*, 282 N. Y. 146, 149 (official permit); cf. *Levine* v. *Behn*, 282 N. Y. 120, 125. Here the "fact" involved was the scope of the Russian decrees as a matter of Russian law. The mass of testimony on this question introduced in the *Moscow* case is not transformed from testimony into an "official record" of the kind contemplated by Rule 113 by being printed and included in the record of a court proceeding. In contradistinction to the type of evidence admissible on motions under the first eight subdivisions of the Rule, this paragraph was specifically designed to preclude reliance by defendants (in actions other than those expressly covered by the first eight subdivisions) on affidavits or other testimonial evidence. See *Lederer* v. *Wise Shoe Co.*, 276 N. Y. 459, 464. Adherence to this rule is especially desirable where the factual issue pertains to foreign law, as to which, as the Court of Appeals itself has recognized, different trials and varied records can lead to different results. *Dougherty* v. *Equitable Life Assurance Soc.*, 266 N. Y. 71, 99–100, 110; *Matter of People* (*First Russian Ins. Co.*), 255 N. Y.

428, 432; cf. *Lazard Bros. & Co.* v. *Midland Bank Ltd.* [1933] A. C. 289."[32]

Finally, the elementary requirement that the moving party attach to his papers copies of all documents relied on, including court records (*Neff* v. *Palmer*, 131 Misc. 671 (Sup. Ct.); *Pross* v. *Foundation Properties, Inc.*, 158 Misc. 304, 307 (Sup. Ct.); *Wels* v. *Rubin*, 254 App. Div. 484 (1st Dept.)) was not complied with, nor was reference made to any specific documents. Petitioner had no opportunity to object to this omission, since it had no reason to believe that respondent intended to rely upon the evidence in the *Moscow* case as an official record.[33]

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[32] Respondent, not being a party to the earlier action, could not rely upon the decree in the *Moscow* case as *res judicata* (*Rudd* v. *Cornell*, 171 N. Y. 114, 127; *St. John* v. *Fowler*, 229 N. Y. 270, 274) and he did not attempt to do so.

[33] If respondent had raised an issue with respect to the intended scope of the Soviet decrees and the court below had passed upon that issue, this Court would have had power, we believe, to review the state court's decision and to determine the scope of the Soviet decrees independently. See the discussion in the Government's brief in *United States* v. *Moscow Fire Ins. Co.*, No. 355, October Term 1939, pp. 46–51. Even if this Court had no such power, it would have to decide the federal question whether New York may deny effect to the Soviet decrees on grounds of a local public policy against confiscation; the decision of the Court of Appeals in the *Moscow* case on the scope and meaning of the Russian law was largely based on the view that the Soviet decrees could not, as a matter of New York law, cover the New York assets and that, therefore, the decrees should not be interpreted as intended to cover them. 280 N. Y. 286, 307–310.

## CONCLUSION

It is respectfully submitted that the decision below should be reversed.

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OCTOBER, 1941.

# APPENDIX A

The opinions in *Moscow Fire Ins. Co.* v. *Bank of New York & Trust Co.*, 280 N. Y. 286 (1939) are as follows:

LEHMAN, Judge.

**[297]** Moscow Fire Insurance Company was organized in 1858 as a joint stock fire insurance company under the laws of the Russian Imperial Government. In 1899 it was authorized to transact business in this State in accordance with the provisions of section 27 of the Insurance Law (Consol. Laws, c. 28). That section provides that "no insurance corporation organized and existing under the government or laws of any state or country outside of the United States" shall transact business here unless it "shall have securities or other property within the United States, deposited with insurance departments or state officers and held in trust by a trustee or trustees, as hereinafter provided, for the protection of all its policyholders and creditors within the United States * * *." The statute fixes the amount of the securities or other property which must be so deposited or held in trust and further provides that "for all purposes specified in this chapter, the capital of such a foreign insurance corporation * * * shall be the aggregate value of all securities and other property * * * deposited with insurance departments or state officers and held in trust by a trustee or trustees. * * *" Moscow Fire Insurance Company complied with all the re-

quirements of the statute and [298] through its branch here transacted insurance business in this State under the supervision of the Superintendent of Insurance. In 1918 when the Soviet government, officially described as the Russian Socialist Federated Republic, successfully seized ruling power in Russia, the company had here large capital and its business was prosperous.

In December, 1918, the Soviet government promulgated a decree "declaring all kinds of insurance a state monopoly. * * * All private insurance companies were to be subject to liquidation and became state property." *Dougherty* v. *Equitable Life Assur. Society of United States*, 266 N. Y. 71, 82, 193 N. E. 897, 900. Other decrees followed by which the existence of all insurance companies *in Russia* was terminated, their assets *in Russia* seized, and their business *in Russia* became part of a government monopoly. Until 1933 the government of the United States did not accord recognition to the Soviet Republic. The decrees of the Soviet government were completely effective in Russia but until recognition the decrees of the government could not be given here the force and effect of mandates of a lawful sovereign. Insurance corporations, organized under the laws of a Russian government which had ceased to exist, continued to transact business here through local agents with local capital, in accordance with the statutes of this State, though, as we have said in other cases, at their own domicile their existence was terminated and their property confiscated by decree of a "governmental establishment which actually governs, which is able to enforce its claims by military force, and is obeyed by the people over whom it rules."

*Russian Reinsurance Co.* v. *Stoddard*, 240 N. Y. 149, 158, 147 N. E. 703, 705. Such a corporation was actually and effectively dead in Russia. It was legally dead in countries where the Soviet Republic was recognized, and since recognition "is retroactive in effect and validates all the actions and conduct of the government so recognized from the commencement of its existence" (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 303, 38 S. Ct. 309, 311, 62 L. Ed. 726), belated recognition by the United States might change retroactively a being endowed with life into a corpse. The result is a tangle of juristic [299] rights and obligations which cannot be unravelled by strict logical application of juristic concepts. As we pointed out in *Russian Reinsurance Co.* v. *Stoddard, supra*, 240 N. Y. pages 162, 163, 147 N. E. pages 706, 707, "the situation is, not only without precedent, but anomalous" and "there can be no true precedent in the books, when the facts are unprecedented."

In spite of the fact that the existence of Moscow Fire Insurance Company was, in 1918, terminated in Russia, its home, by decree of the Soviet Republic, it continued to transact business here until 1925 through its local or United States branch. Then by order of the Supreme Court of this State the Superintendent of Insurance took possession as liquidator of the assets of that branch (constituting the capital of the United States branch), pursuant to the provisions of section 63 of the Insurance Law. These assets consisted of securities deposited with the Insurance Department or held in trust for the policyholders and creditors of the company within the United States, as required by the statute. After the Su-

perintendent of Insurance had paid the domestic policyholders and creditors and also the creditors, whether foreign or domestic, who acquired liens by attachment before liquidation was begun, the Superintendent still had in his possession assets of great value. In *Matter of People, by Beha, v. Russian Reinsurance Co. of Petrograd, Russia*, 255 N. Y. 415, 175 N. E. 114, the problem of the disposition that should be made of such surplus assets was presented.

Ordinarily any surplus, remaining after the domestic creditors and policyholders of a foreign insurance company doing business here were paid, would be transmitted to the foreign corporation at its domicile or to the domiciliary liquidator or administrator if the foreign corporation was in liquidation. *Matter of People by Stoddard, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 151 N. E. 159. The decrees of nationalization and confiscation by the unrecognized governmental establishment then ruling in Russia made that course impossible. Cf. *James & Co. v. Rossia Ins. Co.*, 247 N. Y. 262, 160 N. E. 364. Alternative courses were urged upon us. The assets of the **[300]** United States branch which had been taken over by the Superintendent of Insurance under authority of the State might be left in his custody until "a government in Russia is recognized by the United States or until the surplus funds may be transmitted to a liquidator or legal representative of the corporation at the domicile abroad (i. e., in Russia) or in accordance with any provision of a treaty of the United States"; or the court might, in the exercise of its broad powers, provide, in the extraordinary condition then prevailing, an extraordinary method of adminis-

tering and distributing the assets then in the control and custody of the State. The court chose the latter course. *Matter of People, by Beha,* v. *Russian Reinsurance Co.,* supra, 255 N. Y. page 421, 175 N. E. 114.

In that case we pointed out that "in the silence of the statute, a decree instructing the liquidator as to the administration of the surplus must conform to the exactions of equity and justice." Though "the superintendent of insurance has fulfilled the statutory trust when he has paid the domestic creditors * * * for whom the trust was laid upon him," yet, so we said "the surplus must be made available for the payment of creditors and policyholders with claims founded upon foreign business" and any remainder distributed to those entitled to it, where possible through directors of the corporation. "The present state of the law in respect of these Russian corporations driven from their domicile, and there subjected to decrees of confiscation and extinction has been expounded with a full review of the decisions in a recent judgment of this court. *Petrogradsky Mejdunaroidny Kommerchesky Bank* v. *National City Bank,* 253 N. Y. 23, 170 N. E. 479; cf. *Severnoe Securities Corp.* v. *London & Lancashire Ins. Co.,* 255 N. Y. 120, 174 N. E. 299. The ruling was that they were still juristic persons, and that their boards of directors, represented by a quorum, were still competent to act. The doctrine of that decision controls the case at hand" 255 N. Y. pages 422, 423, 425, 175 N. E. pages 116, 117.

Accordingly the Superintendent of Insurance was directed to pay "to the corporations, represented by directors, a quorum of the board," (255 N. Y. page 424, 175 N. E.

page 117) the surplus remaining after [301] domestic policyholders and creditors had been paid and provision made for vigilant foreign creditors. Moscow Fire Insurance Company was no longer represented by directors, a quorum of the board. It had been left with but one director. He might be treated, so we said, as a conservator, but delivery to conservators was to be conditioned upon the execution of a surety company bond that they would faithfully apply the assets to the use of the corporation, its creditors and shareholders; or, in the event of failure to comply with the condition, the assets might be deposited with a trust company "as agent or depositary upon the stipulation of the insurance company and its conservators that the fund will not be withdrawn except upon the order of a court of competent jurisdiction." *Matter of People, by Beha, Moscow Fire Ins. Co. of Moscow, Russia*, 255 N. Y. 433, 435, 175 N. E. 120, 121.

The assets of the company were deposited on April 18, 1933, with the Bank of New York and Trust Company as agent or depositary of Moscow Fire Insurance Company and of its sole surviving director and conservator, upon a stipulation that they would not be withdrawn except upon the order of a court of competent jurisdiction. Immediately suits were brought in the Supreme Court of the State to determine the disposition of these assets. These suits were consolidated and referred to a referee to hear and determine. While the issues were pending and undetermined, the United States government on November 16, 1933, recognized the Soviet government and by that act of recognition every decree made by the Soviet government from the time it was established was retroactively given the force

and effect which must be accorded to the lawful decrees of a legitimate sovereign. Included were the decrees of 1919 and 1920 by which insurance in Russia became a State monopoly; the existence of private insurance companies terminated and their property appropriated. The Soviet government has not itself taken steps to enforce claims against American nationals. All such claims were assigned to the United States government. Cf. *United States* v. *Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134. Asserting its rights under that assignment, **[302]** the United States has made claim to all the assets of the Moscow Fire Insurance Company which were deposited with the trust company awaiting the order of a court of competent jurisdiction of this State.

Assignment of the claim of the Soviet government to the United States did not divest the State court of its control of the fund which was deposited with the trust company pursuant to order of the court and which remained subject to its order. The courts of this State continued to exercise exclusive jurisdiction over that fund in the action, then pending, to determine how the fund should be distributed. An independent action brought by the United States in a Federal court against the depositary of the fund was dismissed for that reason, and the United States was relegated, for assertion of its claim, to the "appropriate forum where the funds are held." *United States* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 481, 56 S. Ct. 343, 349, 80 L. Ed. 331. Then the United States intervened in this action and now appeals from a judgment on the merits dismissing its claim.

The rights of the United States are derived solely from the assignment by the Soviet government of its claims against nationals of the United States. The claims of the Soviet government for the moneys or property, in this country, of Moscow Fire Insurance Company are based solely on its decrees of nationalization of insurance companies and of seizure of their assets. The United States asserts here title to property of a branch in this State of a Russian insurance corporation which it is said was transferred, by force of these decrees, from the insurance corporation to the Russian government. Two questions arise: first, whether the Russian decrees were intended to have such effect, and, second, whether even if so intended the courts of this State will give them their intended effect.

In considering those questions, some general principles must be accepted as established premises. They are to be found expressed or implicit in the prevailing opinion of this court in *Dougherty* v. *Equitable Life Assurance Soc. of United States*, 266 N. Y. 71, 193 N. E. 897 and in the opinions of the Supreme Court of the [303] United States in *United States* v. *Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 and *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 58 S. Ct. 785, 82 L. Ed. 1224. Recognition of the Russian government has given to its decrees retroactively the force and effect of foreign law. "The government of Russia is in all respects to be treated as any other power in Europe. * * * Soviet Russia * * * stands in the same position as if the government of Russia had never been interrupted by revolution; its decrees have the same force and effect as if they had been issued by the

imperial government." Per Crane, J., in *Dougherty* v. *Equitable Life Assurance Soc.*, supra, 266 N. Y. page 84, 193 N. E. page 900. The question then of the construction of the Soviet decrees is a question of the law of Russia to be determined, like other questions of foreign law, upon the testimony of expert witnesses, decisions of the foreign courts or officers authorized to promulgate or authoritatively construe the foreign law, and upon the relevant documents. The question of the *effect* to be given to the foreign law within this State by the courts of this State must be determined in accordance with the law of this State. Recognized principles of comity and international law or the control of international relations intrusted under the Constitution to the Federal government are factors which at times dictate the content of the law of the State in such matters, but foreign law is of effect here only in so far as the local law gives it effect. It is the established law prevailing in every State under the Constitution of the United States that "the courts of one will not sit in judgment upon the acts of the government of another, done within its own territory," and that "within the field of its powers, whatever the United States rightfully undertakes, it necessarily has warrant to consummate. And when judicial authority is invoked in aid of such consummation, State Constitutions, state laws, and state policies are irrelevant to the inquiry and decision." *United States* v. *Belmont*, 301 U. S. 324, 327, 331, 57 S. Ct. 758, 759, 761, 81 L. Ed. 1134. Outside of that field the State determines its own public policy and embodies it in its own law.

[304]

Accepting these principles as established now beyond challenge, we apply them to the facts in this case. At the risk of repetition, perhaps needless, we emphasize here that the United States is claiming only as assignee of the Soviet government in the assertion of rights which have no other basis than the Soviet nationalization and confiscation decrees. "There is nothing * * * to suggest that the United States was to acquire or exert any greater rights than its transferor or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States * * * is to do more than the Soviet government could have done after diplomatic recognition—that is, collect the claims in conformity to local law. Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them." *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 143, 58 S. Ct. 785, 794, 82 L. Ed. 1224. The United States has not invoked the judicial authority of the States in aid of an agreement it has consummated, calculated to give the decrees of the Soviet government force beyond the force given to decrees of other recognized governments. It invokes the aid of the court only to enforce the rights of the Soviet government, whatever they might be, which the United States has acquired by assignment, to property within this State and subject to the law of the State.

Before recognition, while the courts of this country were not yet subject to the rule imposed by comity between independent sovereign States that "the courts of one [country] will not sit in judgment

upon the acts of * * * another, done within its own territory," there was reluctance, rooted in our age-old common law traditions of ordered liberty, to assume that decrees of the Soviet government which confiscated property without compensation or otherwise exceeded the powers which, in accord with common law principles and traditions, a sovereign might *properly* exercise, should, after recognition, be treated in full sense as "law" even within Russia. Whether doubts, then expressed, or [305] limitations, suggested in advance, upon the effect which the courts here would give to such decrees of the Soviet were well founded, need not now be considered. After recognition, the court in *Dougherty v. Equitable Life Assurance Society of United States*, supra, held that *wherever Russian law governs* the rights and obligations of insurance companies, there the courts of this State will give full effect to the decrees of monopolization and nationalization of insurance and insurance companies in Russia. It applied the rules of Russian law in the performance of obligations owed to persons not citizens of the United States by a Russian corporation under a contract made in Russia, to be performed primarily in Russia and by agreement of the parties to be governed by the law of Russia. The opinion indicated in clearest language that what was there said and decided was limited to rights *"dependent upon the law of Russia,"* analogous to "right to tangible property in Russia or the possession thereof" (page 88, 193 N. E. page 902). Nothing said indicates that rights to property in New York belonging to the United States branch of a Russian insurance company *are* dependent upon the

law of Russia as formulated in the Soviet decrees. That is the problem presented here.

The United States relies primarily upon three decrees. They are described in the findings of the referee as follows:

"88. The decree of November 18, 1919, on the annulment of life insurance contracts abolished insurance of life in all its forms in the Republic and annulled all contracts with insurance companies and savings banks with respect to the insurance of life, capital and income.

"89. The decree of the Soviet of People's Commissars dated March 4, 1919, on the liquidation of obligations of State enterprises, provided that stock certificates and shares of joint stock companies, whose enterprises have been either nationalized or sequestered, are annulled and also provided that such enterprises are free from the payment of all debts to private persons and enterprises which have arisen prior to the nationalization of these enterprises, including payments on bond loans with the exception only of wages due to workers and employees.

[306] "90. The decree of the Soviet of People's Commissars dated June 28, 1918, provides in Article I that the commercial and industrial enterprises enumerated therein, which are located within the boundaries of the Soviet Republic, together with all their capital and property, regardless of what the latter may consist, are declared the property of the Republic."

The opinion of an expert witness on the law of Soviet Russia and interpretative decrees or declarations of Soviet boards or officers, supports the contention of the United States that these decrees were intended to

apply to the business of Russian insurance companies not only inside Russia but also without Russia, and to transfer to the Russian government all the property of the insurance companies as the "indivisible property of the indivisible juristic persons." In spite of such testimony the referee has found that the decrees were not intended to apply to the property in this State of the United States branch of Moscow Fire Insurance Company.

Opinions of expert witnesses will not control the judgment of a judge in regard to foreign law "except to the extent that it is a reasonable inference from statute or from precedent or from the implications of a legal concept, such as contract or testament or juristic personality. (Citing cases.) Unless it is this, the judge must use his own judgment and find the meaning of the foreign law as he would if the meaning to be ascertained were that of a deed or an agreement. This is as true upon appeal as it is upon a trial. At such times and for such inquiries, opinion has a significance proportioned to the sources that sustain it." *Petrogradsky Mejdunarodny Kommerchesky Bank* v. *National City Bank*, 253 N. Y. 23, 34, 170 N. E. 479, 483, opinion by Cardozo, Ch. J., cited with approval in *Dougherty* v. *Equitable Life Assurance Society; of United States, supra.* Tested by that standard the findings of the referee are fully sustained by the evidence even though no expert witness was produced by the respondents to guide the judgment of the referee.

In a long series of decisions the courts of England have held that decrees by the Soviet government nationalizing [307] the business of banking or insurance, canceling

obligations of banking and insurance companies and confiscating their property were not *intended* to apply to property of the companies with situs outside of Russia, or to obligations to be performed outside of Russia. *Matter of Russian Bank for Foreign Trade*, [1933] Ch. Div. 745; *Russian Commercial & Industrial Bank* v. *Comptoir D'Escompte De Mulhouse*, [1925] A. C. 112; *First Russian Ins. Co.* v. *London & Lancashire Ins. Co.*, [1928] Ch. Div. 922; *Luther* v. *Sagor*, [1921] 3 K. B. 532. Even if so intended they would not in England be given such effect though the Soviet government was recognized and its decrees were part of the law of Russia. *Sedgwick, Collins & Co.* v. *Russia Ins. Co. of Petrograd*, [1926] 1 K. B. 1; *Employers' Liability Assur. Corp.* v. *Sedgwick, Collins & Co.*, [1927] A. C. 95. It is pointed out in the opinion in *Matter of Russian Bank for Foreign Trade*, supra, that the Russian Soviet government in 1922 and 1923 in official circulars and regulations itself gave similar interpretation to such decrees. It also appears from the same opinion in the English case that the courts of France gave similar limited extraterritorial effect to such decrees.

There is no need here to consider whether *in general* Soviet confiscatory decrees are intended to apply to property with situs in this State, or whether, if so intended, the courts of this State would give the decrees such effect. Such questions are left open by the opinion in *Dougherty* v. *Equitable Life Assurance Society of United States*, supra, and the doubts there expressed or implied are not to be either confirmed or removed until the questions are more clearly presented. We deal here with a class of

property and a juristic person sui generis. Certainly no decree monopolizing the business of insurance in Russia; taking over the conduct of the insurance business formerly conducted in Russia by insurance corporations, and terminating the obligations of such companies could possibly have been intended to apply to business conducted here, or if so intended, could be binding here. This State by its own laws determines what organi[308]zations shall be permitted to conduct the business of insurance here, what capital or security shall be required and in other respects how such business shall be conducted. Certainly no foreign government may decree that it will take over the business here conducted by a corporation approved by this State, and cancel or change obligations to be performed here by such corporations.

No contention so opposed both to common sense and generally accepted juristic concepts is strongly urged here; but we are told that after capital of the corporation here has been applied in satisfaction of claims of creditors and policyholders here, the decrees do operate to confiscate and transfer to the government the surplus capital. There is nothing in the decrees to indicate that though the Russian government could not take unto itself the business of insurance conducted by Russian corporations here, yet the Russian Soviet government did intend to take unto itself the property of the company here. The property which the United States government claims is what remains of the capital which this State required the insurance company to deposit here with the Insurance Department or with trustees. It is the property which at all times has been within the State of New York. As the

referee has found, it "has always been held by and the legal title thereto vested in trustees resident in and citizens of the United States." It has always been subject to the control of the Insurance Department and in a practical sense has always been in the custody of the State. At no time could the insurance company or the Russian government have transferred it to Russia. In strongest sense its situs was in this State, and the control of this State complete. No juristic fiction that the situs of intangible property is the domicile of the owner could overthrow those facts. Over such property it is clear that the Russian government, either Imperial or Soviet, had no power of control, and as the referee properly found, asserted no power of control. In *Dougherty* v. *Equitable Life Assurance Society of United States*, supra, the court, as we have said, was dealing with obligations dependent upon Russian law. In *United* [309] *States* v. *Belmont*, supra, the court was considering the sufficiency of pleadings which conclusively established that the United States was asserting, under assignment from the Soviet government, a claim to *intangible* property here of a Russian corporation which under Soviet decree had been confiscated by the government. See opinion of Circuit Court of Appeals, 2 Cir., 85 F. 2d 542. The allegations in the complaint that under the decree the property of the corporation was confiscated by the Russian government and then transferred to the American government was admitted by demurrer, and as the court pointed out, were not open to challenge. Such cases in nowise support the appellant's contention here, where we are considering whether title to property in the custody of this State

has been transferred in invitum from its owner to the Soviet government or is "dependent" upon the law of Russia.

Even if, as the expert witness testified, the decrees were intended to apply to the "indivisible" property of the "indivisible juristic persons," the property of the United States branch of a Russian insurance company must fall outside the scope of a decree so defined. The Insurance Law requires that before a foreign insurance corporation is permitted to do business here there must be a definite separation and division of its property and even of its juristic personality. "The Insurance Law, as now written, and as an entirety, indicates a purpose and policy in dealing with foreign insurance companies doing business in this country which are so definite and plain that they fix upon the words under consideration an interpretation which cannot fairly be avoided. We think that the Legislature in allowing these foreign companies to do business in this state and country intended to treat the domestic agency largely as a *complete and separate organization;* to place it on a parity with domestic corporations; to supervise and regulate it as such; and to require it by the deposit of prescribed assets to *set up within this country a capital corresponding to that of domestic corporations,* and which should be security for business transacted by it here and not elsewhere." *Matter of* [310] *People by Stoddard, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 158, 151 N. E. 159, 162. [Italics are new] Thus the property of the United States branch of a foreign insurance company acquires a character of its own. That character is "dependent" upon the law of

this State. The property from its nature is subject to the laws of this State, and both the property and the "complete and separate organization" analogous to a domestic corporation are immune from the control of any foreign power. No rule of comity and no act of the United States government constrains this State to abandon any part of its control or to share it with a foreign State. The findings or conclusions of the courts below that the decrees of nationalization of insurance were not intended to have effect here and that title to and right to possession of the capital of the United States branch of the insurance company is dependent upon the law of this State, rest upon a firm foundation.

Difficulty still remains, however, in determining the persons or corporations who may share, under the *law of this State*, in the distribution of the assets of the United States branch of Moscow Fire Insurance Company, regarded as a "complete and separate organization" created and regulated by the law of this State. Upon liquidation that separate organization ceased to exist and the parent corporation was not authorized to transact business here. When those who had done business with the United States branch as a separate and complete organization had been paid out of its capital here there was no longer any reason why the State, acting through the Superintendent of Insurance, should retain its control or custody of the assets here. The parent corporation at its domicile or a domiciliary administrator of the corporation would ordinarily be entitled to its property, and creditors or stockholders might, in accordance with the law of the

domicile, present their claims there. Though the Soviet decrees upon which the appellant relies have no extraterritorial effect upon property or corporate branch located here, in Russia the decrees have effected the death of the parent company. Lazard Bros. & Co. v. Midland Bank, Ltd., [1933] App. [311] Cas. 289. The corporation cannot make any claim for itself or for its stockholders or its unpaid creditors residing in Russia or elsewhere than in the United States, and there is no domiciliary administrator who might distribute the assets among such creditors or stockholders. That is why this court has ordered distribution here. Except for the belated claim asserted by the United States after it recognized the Soviet government, upon the death of the parent corporation, property of its branch would now be distributed here among stockholders and creditors in accordance with the judgment entered upon the report of the referee. Has the United States by assignment from the Soviet government acquired a claim superior to these foreign creditors or stockholders?

It was said by Viscount CAVE in Russian Commercial & Industrial Bank v. Comptoir D'Escompte De Mulhouse that "it is not an agreeable task for a British Court of Justice to consider the effect of a series of decrees and orders providing for the compulsory acquisition by a foreign State of the assets of private persons 'on the basis of complete confiscation.'" It is no more agreeable to an American court which administers law based on the same principles and traditions of the common law. None the less the courts of both countries have, after recognition of the Soviet

Republic, given to such decrees the force and effect to which they are entitled as part of the law of Russia. But no principle or authority has been cited which should constrain or, perhaps it should be said, would justify the courts of New York in abandoning control of property situated here in the custody of this State, or in subjecting to Russian law rights to such property which are governed by the law of this jurisdiction. Though we may not "sit in judgment upon the acts of the government of another, done within its own territory;" though this State may not choose between different policies where no choice is left open to us under established rules of law, yet where there is room for choice we are guided by common law principles and traditions embodied in our Constitution, statutes and [312] judicial decisions. To meet conditions for which there was no precedent and for which no provision was made in the statute, this court, as we have said, devised an extraordinary method of administering and distributing the assets in the possession of the State, which we hoped would "conform to the exactions of justice and equity." We have invited creditors and stockholders to prove their claims, and now we are told that the method which in 1931 conformed to the exactions of justice and equity must be rejected because retroactively it has become unlawful; that the suitors who at our invitation have come into court must be dismissed empty-handed; that we must remit the assets in our control to another sovereign to retain or distribute as it sees fit. No principle of law constrains us to do that.

Juridical concepts may be important factors in determining legal rights and obligations when concepts and obligation are parts of a consistent system of jurisprudence. The corporate "fiction" of a single artificial juristic person cannot be applied with unrelenting logic where one sovereign endows the corporation with life and another sovereign permits a branch of the corporation to do business only as a "complete and separate organization." Theories underlying our concept of private property and private rights and obligations are of doubtful validity when, attempting to reconcile what is basically inconsistent, the courts must determine the effect, upon private rights in property situated here, of decrees which elsewhere have destroyed private rights of property and contracts. Perhaps argument might be made that the claims of all persons not our own nationals and not arising through transactions with the United States branch of a Russian insurance company, though under our law untouched by the Soviet decrees until the United States recognized the Soviet government, are under our law retroactively destroyed by such decrees after recognition. No such question is before us. The United States can challenge the claims of those to whom the property has been awarded only if it has a valid claim [313] to the property of the insurance company in the United States. We review the validity of the claim of the United States; defects in the claim of others would not cure invalidity there.

Because the legal title and right of control of the property which the United States is claiming as assignee of the Soviet Re-

public has at all times been in the State or in a trustee subject to the direction of the State, its situs was here and it has been subject exclusively to the laws of the State. Because the United States branch has been under the law of this State a "complete and separate organization" and its assets have constituted "a capital corresponding to that of domestic corporations," the Soviet government's decrees did not automatically terminate the existence of the United States branch or alter the right of the State to control and administer the property according to its own law. At least until recognition of the Soviet government the right of this State to liquidate the capital of the United States branches of Russian insurance companies according to New York law, and to distribute the assets among those who under New York law were its creditors or stockholders, was not open to challenge. The Supreme Court of this State had taken the property into its own custody to make such distribution long before recognition. It had invited claimants to prove their claims. After recognition, the courts of this State were bound to take notice that the parent corporation was legally dead. They had already taken notice that the parent corporation could no longer function. The proceeding for distribution proceeded as before. The law of its domicile ordinarily determines the manner in which property of a corporation is to be distributed, but that rule does not apply invariably. The incidents of ownership of property, especially immovable property, are dependent upon the law of their situs. The property claimed here was in all respects subject to the law of this State.

Though the courts of this State are bound to give effect to the decrees of the Soviet government insofar as these decrees terminated the existence of the company in Russia, they might still proceed with the liquidation of [314] the property in their custody here, treating the United States branch, the creation of the Insurance Law, as a complete and separate organization, as such branches had always for many purposes been treated. As long as the parent company existed it would under the law of this State have certain residual rights in the property of the branch after the branch was liquidated. Those rights arose out of the relationship of parent corporation and branch. The extinction of the parent company by the decrees of the Soviet government has eliminated the parent company and destroyed that relationship. A new situation has arisen which must be met in accordance with the law of this State. The courts, giving effect as they must to the extinction of the parent company, must determine whether the parent company's residual right to property here passes by confiscatory decree to the sovereign who extinguished the parent corporation or whether under the law of this State such rights have passed to the stockholders and foreign creditors who, in answer to an invitation extended to them by this State, have come in and prover their claims in accordance with a procedure devised by this court to "conform to justice and equity" as those terms are understood here. The courts below have made the proper choice, not because enforcement of confiscatory decrees of property situated elsewhere is contrary to our public policy, but because under the law

of this State such confiscatory decrees do not affect the property claimed here.

The judgment should be affirmed, with costs.

RIPPEY, Judge (dissenting).

On March 16, 1917, the Imperial government of Russia was overthrown. On that date the Provisional government of Russia was set up and on March 22, 1917, the Provisional government of Russia was recognized by the United States. On July fifth of that year Boris Bakhmeteff was recognized by the President of the United States as the Ambassador from the Provisional Government and Serge Ughet as financial attaché of the Russian Embassy in the United States. The Union of Soviet Socialist Republics, known and referred to as the [315] Soviet government, superseded the Provisional government on November 7, 1917. Thereupon the Soviet government dismissed Bakhmeteff as Ambassador, but the United States continued to recognize him to June 30, 1922, and the financial attaché down to November 16, 1933. To recover any property of the Imperial, Provisional or Soviet governments held in our country by our nationals, his status was such that he might have brought suit at any time after July 5, 1917, and prior to November 16, 1933. *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 58 S. Ct. 785, 82 L. Ed. 1224. Full recognition was granted by the United States government to the Soviet government on November 16, 1933, and, by that act, every act of the Soviet government prior to recognition was validated. *United States* v. *Belmont*, 301 U. S. 324, 57 S. Ct. 758, 81 L. Ed. 1134. Recognition being an accomplished fact,

every pertinent act of the Soviet government from the beginning must be given full force. *Dougherty* v. *Equitable Life Assurance Soc. of United States*, 266 N. Y. 71, 193 N. E. 897.

Decrees, laws, enactments, and orders of the Soviet government, promulgated during the years 1918 and 1919, expressly or by implication, both as matter of fact and matter of law, and as understood and construed by that government, (1) nationalized and monopolized the business of insurance in all its forms whereby all Russian insurance companies were dissolved, terminated and liquidated, and their assets, including the assets of all their branches and subsidiaries, in whatever form and wherever located and in whatever manner and wherever held, were confiscated and forthwith became the property of the Soviet government, (2) repudiated, canceled, annulled and discharged all debts of those companies, their branches and subsidiaries, to whomsoever and wherever owing, (3) extinguished all rights of their shareholders, and (4) discharged all obligations and liabilities of the companies. The result was that the Soviet government became the owner and entitled to the immediate possession of all property of the nationalized companies and of their branches and subsidiaries, wherever physically located, as of the date of nationalization. The [316] property of the Moscow Fire Insurance Company, of Moscow, Russia, wherever physically situate, with all its subsequent accretions, then became the property of the Soviet government, free from all claims of creditors, policyholders or stockholders, except as nationals of the country where such property was physically located

might be permitted by the public policy of that country or by its own and international law to assert their claims. Such conclusions, it seems to me, are unassailable, both in fact and in law, as I shall presently more fully point out. International comity and expediency bar assertion to the contrary in any court of the United States. *United States* v. *President and Directors of Manhattan Co.*, 276 N. Y. 396, 12 N. E. 2d 518; *United States* v. *Belmont*, supra; *Shapleigh* v. *Mier*, 299 U. S. 468, 471, 57 S. Ct. 261, 81 L. Ed. 355, 113 A. L. R. 253.

The Moscow Fire Insurance Company, of Moscow, Russia, was organized under the laws of the Empire of Russia in 1858 and was admitted to do business within the State of New York in 1899. It organized a United States branch and deposited from its own property in Russia (not originating from contributors or shareholders within the United States) security expressly for the protection only of domestic creditors and policyholders as required by section 27 of the Insurance Law (Consol. Laws, c. 28) of the State of New York. That deposit remained the property of the parent company, subject only to the claims of domestic creditors. *Matter of People, by Stoddard, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 151 N. E. 159. Thereupon the Superintendent of Insurance issued a license to the branch to transact business here. Upon keeping the deposit good the license was renewed from year to year thereafter until 1925. On August 8, 1925, pursuant to the provisions of the Insurance Law, the Superintendent of Insurance was appointed liquidator of the local branch. During the progress of the liquidation the claims of

all domestic creditors and of all policyholders through the local branch and of all foreign creditors who had attachments when the Superintendent took possession were paid in full and the question arose as to what disposition should be made of the cash and securities, [317] aggregating $1,080,399.54, remaining in his possession, legal title to which was then vested in the Soviet government as the successor of the insurance company. He was finally directed to turn the money and securities over to the surviving director of the parent company and/or to the Bank of New York and Trust Company as depositary subject to the order of a court of competent jurisdiction (*People, by Beha, Moscow Fire Ins. Co. of Moscow, Russia*, 255 N. Y. 433, 175 N. E. 120; *People, by Beha*, 262 N. Y. 453, 188 N. E. 17; cf. *United States* v. *President and Directors of Manhattan Co.*, supra, page 401, 12 N. E. 2d 518), which he did on April 18, 1933. Thereupon these actions were commenced by creditors and by stockholders of the parent company, none of whom were our nationals. After consolidation of the actions and trial of the issues therein raised, a judgment of distribution was entered by the Supreme Court on August 18, 1934, and subsequently affirmed by the Appellate Division.

The record in that proceeding establishes that the claimants to whom distribution was directed to be made (with the possible exception of three) were all variously residents and citizens of Latvia, Norway, Sweden, Russia, Estonia, Poland, Germany and France, having claims arising variously out of agency contracts and insurance and reinsurance contracts written and to be per-

formed in countries other than the United States, ownership in shares of the parent company and services rendered by attorneys and others to the parent company and to the liquidating director of the Moscow company in foreign countries. None of the claims of foreign creditors or shareholders arose out of relations with the local branch and adjudication followed our law, not Soviet law, the law of the domicile of the owner of the fund. The validity of those claims depended on the laws of the Imperial government of Russia and its successors (*Dougherty* v. *Equitable Life Assurance Soc. of United States, supra; Canada Southern Ry. Co.* v. *Gebhard,* 109 U. S. 527, 537, 3 S. Ct. 363, 27 L. Ed. 1020), or upon the laws of the countries of the citizenship of the claimants or where the claims arose. *Severnoe Securities Corp.* v. *London & Lancashire Ins. Co.*, 255 N. Y. 120, 174 N. E. 299. Said the Supreme Court in the *Gebhard* case, *supra* (109 U. S. 527, 3 S. Ct. 370): "Such being the law, it follows that every person who deals with a foreign [318] corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him. He is conclu-

sively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. *It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.*" [Emphasis mine.]

The Moscow Fire Insurance Company existed "only under the express law of the state or sovereignty by which it was created. Its dissolution puts an end to its existence, the result of which may be likened to the death of a natural person." *Chicago Title & Trust Co.* v. *Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U. S. 120, 124, 58 S. Ct. 125, 127, 82 L. Ed. 147. As the corporation went so went its local branch. Though dead, the parent survived, this court has held, as to its property in this State in the sense that its surviving director might possess its assets with situs here, after satisfaction of the claims of our nationals. *People, by Beha*, 255 N. Y. 433, 175 N. E. 120.

No amount of argument can change the fact that there is no foundation in our statute law, in the decisions of our courts, in reason, logic of elsewhere for the assertion that the branch of a foreign corporation is a juristic, legal or factual entity, separate and distinct from the parent company, or that it may be placed in the same position as a domestic corporation as to rights and obligations and capable independently to perform corporate functions. The con[319]trary has been held in this State as a necessary basis for the decision

in *James & Co.* v. *Second Russian Ins. Co.*, 239 N. Y. 248, 146 N. E. 369, 37 A. L. R. 720, in the instant case where this court ordered deposit of the fund with the surviving director of the parent company (People, by Beha, 255 N. Y. 433, 175 N. E. 120), and in other cases involving Russian corporations where similar orders and decisions were made. Nothing to the contrary was held by this court in *Matter of People* by *Stoddard, Norske Lloyd Ins. Co.*, 242 N. Y. 148, 159, 151 N. E. 159, 162. No such broad rule as is claimed here was there laid down nor was there occasion for it. Whatever was said there was limited to the question as to whether assets of an insolvent foreign insurance company located in this country should be applied, if necessary, to satisfaction of claims of policyholders who were residents of the United States, not alone when these policies were written here but when such policies were written abroad, and it was held that the deposit required by the statute "*should be security for business transacted by it here* and not elsewhere." [Emphasis mine.] The decision is authority for the proposition which we are now asserting that beyond our own nationals whose claims originated here or those who had liens on the fund prior to the time the Superintendent of Insurance took possession, the control or authority of our courts is limited to turn over the surplus, under proper safeguards, to the parent corporation, its successor or its representative, in the foreign jurisdiction. This rule was again definitely emphasized in *James & Co.* v. *Rossia Ins. Co. of America*, 247 N. Y. 262, 160 N. E. 364 and in *Matter of People* by *Stoddard, Norske Lloyd Ins.*

*Co.*, 249 N. Y. 139, 163 N. E. 129, where the subject of interest on claims against the same company was under consideration, and Judge Lehman said (pages 145, 146, 163 N. E. page 130): "Other creditors, including American citizens, may share only in the distribution of assets of the foreign liquidators, appointed in the jurisdiction where the corporation is domiciled, to whom the superintendent of insurance must transmit any surplus of the funds in his charge, remaining after the payment of those creditors who are entitled to payment therefrom. *Matter of People, City Equitable Fire Ins. Co., Limited of London, England*, 238 [320] N. Y. 147, 144 N. E. 484." That we may not distribute the surplus to foreign claimants in our courts, in the absence of liens or attachments by foreign claimants, was most emphatically emphasized in *Matter of People*, by *Beha* v. *Russian Reinsurance Co.*, 255 N. Y. 415, 175 N. E. 114, since there was no insolvency and the corporation, though legally dead at its domicile, was still a "juristic" person for whom its directors were empowered to act. See, also, *Matter of People*, by *Beha, Second Russian Ins. Co.*, 256 N. Y. 177, 181, 176 N. E. 133, 134, where this court, citing the case reported in *People* by *Stoddard, In re Norske Lloyd Ins. Co.*, 242 N. Y. 148, 151 N. E. 159 said: "As the claim originated in an alien country, through a contract between aliens, it was a foreign claim, not entitled to a share in the distribution made by the superintendent of insurance, from the funds received by him." No emergency or occasion now arises for the definition of a "branch" of a foreign company such as has been suggested. To avoid the clear mean-

ing of the statutes and the direct, implicit and constant holdings of this court amounts to writing into the statute something that does not now exist and it is beyond our province or power to do so. The successor of the parent company could sue here, the fiscal agent of its successor, the Soviet government, to the time of the assignment could have enforced its claims (*Guaranty Trust Co.* v. *United States*, supra) and, though dead in its domicile, its surviving director, though an exile from Russia and a nonresident here, so this court has held, can take control of its property here, not because it belongs to its local branch as a separate domestic corporation or as a *separate entity*, but because it still belongs to the parent corporation, a "juristic" person, itself. The branch was independent of the parent company, so far as here material, only to the extent that the statute requires that our jurisdiction shall not be limited so as to hamper our courts in extending, out of its assets in this country, "the protection of all its policyholders and creditors within the United States." Insurance Law, § 27.

There can be no question of the powers of the Soviet government to take the course it pursued or to put into [321] effect the result indicated, either before or after recognition by our government, within its own territory and, under Russian law, Russian creditors, policyholders and shareholders have redress only against the State. See *Canada Southern Ry. Co.* v. *Gebhard*, 109 U. S. 527, 537, 3 S. Ct. 363, 27 L. Ed. 1020. Neither can there be any question of the necessary result of the laws, enactments and orders of the Soviet government as affecting property extraterritorially ex-

cept insofar as the public policy of the place of the location of that property may interfere. By force of the Soviet law, its authority is binding in the United States. *Canada Southern Ry. Co.* v. *Gebhard*, supra. We have no domestic policy that may interfere with the effect of its nationalization and confiscation decrees on its relations with foreign creditors and shareholders or on contracts of the nationalized corporation neither made nor to be performed within this country. Wrong to the claimants, if there be any wrong, was done by the Soviet government. As to disputes between nationals of countries other than our own and a foreign country we have no concern. In *United States* v. *Dickelman*, 92 U. S. 520, 524, 23 L. Ed. 742, it is said: "A citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy or, if need be, by war. It rests with the sovereign against whom the demand is made, to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself."

At the time of the diplomatic recognition by the United States of the Soviet government and as a part of the diplomatic exchange between the two governments, an assignment was made to the United States

of all interest which the Soviet government had in the fund in question. Prima [322] facie, the United States thereby became entitled to the whole fund. *United States* v. *President and Directors of Manhattan Co.*, supra. In the *Belmont case*, supra, 301 U. S., page 332, 57 S. Ct., page 761, 81 L. Ed. 1134, in language equally applicable here, the Supreme Court said: "The substantive right to the moneys, as now disclosed, became vested in the Soviet government as the successor to the corporation; and this right that government has passed to the United States." The purpose of the documents exchanged at the time of recognition was to protect and promote the interests of the United States and of its nationals. The assignment, by its own terms, was "preparatory to a final settlement of the claims and counterclaims between the governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals." The assignment is broad and is conclusive on its face. If the purpose and effect of the assignment, read in the light of diplomatic exchanges and recognition of the United States, was not to transfer title to the fund in question and to all other claims against our nationals which the Soviet government might have, it was all an idle ceremony. Its validity, scope and purpose are matters with which the executive branch of our government and of the Soviet government only are concerned and may not be questioned nor its purpose frustrated by the courts. *United States* v. *Belmont*, supra. For the purpose of our courts the Soviet government became vested with legal title to the entire fund and to all its accretions at the time of the

nationalization and confiscation decrees free and clear of any claims of creditors (other than our own nationals) against the same and continued to have such interest to the time of the assignment to the United States. Nothing occurred to change the status or the title or ownership to the fund until the assignment whereby the United States succeeded to the rights of the Soviet government.

After unsuccessfully attempting to invoke the jurisdiction of the Federal courts in its effort to procure the fund, which efforts culminated at or about the date of entry of the judgment in the consolidated actions, the United States [323] forthwith filed a petition to intervene in the State court actions. It asserted it had a valid claim to the entire fund in the hands of the depositary as of the date of acceptance by the latter of the trust, together with all subsequent accretions. Having rightfully intervened and having duly and legally acquired title to the fund, it was entitled to have determined every question that could properly be raised and to contest the right of claimants to sue in our courts and the validity of the claim of each party to the consolidated actions on the merits if necessary, and to assert such defenses thereto as were open to it in the local forum under either the local law or the Soviet law. Cf. *Guaranty Trust Co. v. United States*, supra. It was not bound or prejudiced by any action taken by any of the parties to the consolidated actions or by any decision made by the courts therein prior to intervention, since neither it nor its claim was before the court prior to that time. The United States government has never had an

opportunity to litigate those claims. *Upon a contest by an interested litigant* it might be shown that none of the claims can be maintained in our courts. Such claimants might be found to be without such a standing as would permit them to contest the claim of the intervener. After the United States intervened the only issue tried or determined in the trial court was whether appellant had a right to intervene and contest the claims of respondents. Decision of that question against appellant was based on findings that the United States acquired no right or title whatsoever to the fund in question by the assignment because the Soviet government had no title to give, but that, even though it acquired thereby some interest, the public policy of the State of New York forbade its recognition.

Of course, the Soviet government neither could (*United States* v. *Buford*, 3 Pet. (U. S.) 12, 7 L. Ed. 585) nor presumed to transfer greater title or a more extensive interest in the fund than it had to give. What it acquired by the nationalization decrees or what limitations may be placed by the confisca[324]tion decrees on claims of creditors of the nationalized company must be determined exclusively by the Soviet law. I have indicated that, in my opinion, the scope and effect of the decrees are not open for consideration as a question of fact in our courts. If otherwise, the result is not changed. What was the applicable Soviet law and the intent and scope of the decrees in question was decided by the referee as a question of fact based upon an examination of various documents introduced in evidence and upon the oral testimony of an expert whose opinion he saw fit to disregard.

Where written laws or judicial opinions of foreign courts are involved, the question of construction, if open, is one of law for the court, but where the construction of unwritten laws is involved, what is the law becomes a question of fact. *Genet* v. *President, etc., of Delaware & H. Canal Co.*, 163 N. Y. 173, 57 N. E. 297; *Bank of China, Japan & The Straits* v. *Morse*, 168 N. Y. 458, 61 N. E. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676; *Fitzpatrick* v. *International Ry. Co.*, 252 N. Y. 127, 169 N. E. 112, 68 A. L. R. 801. The referee erroneously decided that the purpose, intent and scope of the decrees did not affect or embrace the property here in question. I find no evidence whatever in the record to sustain his conclusion. If open to construction, the decrees are to be construed in the manner they are understood and applied by the Soviet government. There is no dispute in the record as to how they have been construed and applied by that government. The testimony of the government expert, the various relevant documents and the decisions of Soviet officials authorized to construe and to promulgate and enforce rules and regulations thereon establish without contradiction that the intent, scope, purpose and effect of the Soviet decrees was to embrace within their coverage the property of the Moscow Fire Insurance Company physically located within the United States. There was no evidence to the contrary. As matter of law we must so hold. We are not concerned with the validity of the assignment, for that is a political, not a judicial, question.

No one disputes the fact that our State courts have control over the surplus fund and power to order its distribution. *United*

*States* v. *Bank of New York & Trust Co.*, [325] 296 U. S. 463, 56 S. Ct. 343, 80 L. Ed. 331. That control extends only to its preservation for its rightful owner and the power to distribute extends only to distribution to those rightfully entitled thereto according to law. We have no power to distribute it according to our notions of the equities which, however camouflaged, must of necessity be based on a lingering policy of nonapproval and nonrecognition of the nationalization and confiscation decrees of the Soviet government from which, even now, we hesitate to depart. On no other theory can distribution be ordered here to claimants other than our own nationals or to the intervener. Still, we have said that, however thoroughly convinced in the righteousness and justice of our public policy against nationalization and confiscation of private property we may be, our feelings in the matter must not dictate our judgment (*Dougherty* and *Manhattan* cases, supra, and the Supreme Court, in the *Belmont* case, has added the controlling weight of its authority by asserting that "no state policy can prevail against the international compact here involved" (301 U. S. page 327, 57 S. Ct. page 759, 81 L. Ed. 1134).

The judgment appealed from and the judgment of the Special Term should be reversed and the matter remitted to the Special Term to proceed in accordance with this opinion, with costs to appellant against respondent claimants in all courts.

O'BRIEN, HUBBS, and LOUGHRAN, JJ., concur with LEHMAN, J.

RIPPEY, J., dissents in opinion, in which CRANE, C. J., and FINCH, J., concur.

Judgments affirmed.

## APPENDIX B

Section 27 of the Insurance Law of New York (Consol. Laws, ch. 28):

*Funds and capital within the United States of corporations organized outside of the United States, ~~transacting~~ in this state the business of fire or marine insurance.*—1. No insurance corporation organized and existing under the government or laws of any state or country outside of the United States, hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state, shall transact such business therein unless it shall have securities or other property within the United States, deposited with insurance departments or state officers and held in trust by a trustee or trustees, as hereinafter provided, for the protection of all its policyholders and creditors within the United States as follows: (a) If authorized to transact the business of fire insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and three hundred thousand dollars deposited with insurance departments or state officers or so held in trust; (b) if authorized to transact the business of marine insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and one hundred thousand dollars deposited with insurance departments or state officers or so held in trust; or (c) if authorized to transact the business of both fire and marine insurance,

four hundred thousand dollars deposited with the superintendent of insurance of this state and four hundred thousand dollars deposited with insurance departments or state officers or so held in trust.

2. For all purposes specified in this chapter, the capital of such a foreign insurance corporation now or hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state shall be the aggregate value of all securities and other property within the United States deposited with insurance departments or state officers and held in trust by a trustee or trustees for the protection of all its policyholders within the United States, or all its policyholders and creditors within the United States, after taking from such aggregate value the same deductions for losses, debts and liabilities in the United States and for unearned premiums on risks therein not yet expired as are authorized or required by the laws of this state or the regulations of the superintendent of insurance with respect to domestic insurance corporations transacting the same kind or kinds of business. In addition to the reports required by law of such a foreign insurance corporation, it shall, not later than the fifteenth day of February in each year, file in the office of the superintendent of insurance a detailed statement, as of the thirty-first day of December next preceding, of the items making up such securities and other property so deposited and held in trust by a trustee or trustees and of the deductions to be made therefrom, signed and verified by the United States manager or attorney of such corporation, the items of the securities and other property held

under trust deeds to be certified to by the trustee or trustees; provided that the superintendent may also at any time require a further statement of the same kind and of such date as he may determine. The superintendent of insurance shall, on the filing of such annual statement, or from such examination as he may make of the affairs of such corporation, determine the amount of such capital as of the thirty-first day of December next preceding, and issue to such corporation his certificate of the amount of its capital as so determined; and, if it shall at any time appear that the capital for which the last certificate shall be outstanding has been materially reduced, the superintendent shall issue to such corporation a new certificate stating the amount of such reduced capital; provided that the capital so ascertained is not reduced below the sum of two hundred thousand dollars for a corporation authorized to transact the business of fire or marine insurance only, or four hundred thousand dollars for a corporation authorized to transact the business of both fire and marine insurance.

3. Whenever it appears to the superintendent, from any statement made to him or from an examination made by him or by an examiner appointed by him, that the capital of such a foreign insurance corporation is reduced below the sum of two hundred thousand dollars for a corporation authorized to transact the business of fire or marine insurance only, or of four hundred thousand dollars for a corporation authorized to transact the business of both fire and marine insurance, or that its assets are insufficient to justify its continuance in business, he shall determine the amount of

such impairment or deficiency and issue a written requisition to such corporation, through its United States manager or attorney, to make good the amount of such impairment or deficiency within such period as he may designate, not less than thirty nor more than ninety days from the service of the requisition.

4. That part of the capital of such a foreign insurance corporation required to be deposited with insurance departments or state officers shall be invested and kept invested as is required by the laws of the states where such deposits are made with regard to deposits by insurance corporations organized under the laws of a foreign country. The funds of such a foreign insurance corporation, other than its deposits, may be invested in such securities or other property as may be acquired and held by a domestic insurance corporation transacting the same kind or kinds of business.

5. When any part of the securities or other property of such a foreign insurance corporation is held by a trustee or trustees, such trustee or trustees shall be appointed by the board of managers or directors of such corporation, and a duly certified copy of the vote or resolution creating the trust shall, with a duplicate original of the deed of trust, approved by the superintendent of insurance, be filed in the office of such superintendent. The trustees or trustee shall be either three or more citizens of the United States or a trust company authorized to execute trusts in a state where such corporation has applied for authority or been authorized to do business, and must be approved by the superintendent of insurance. Such super-

intendent may examine such trustee or trustees, and the securities or property of such trust, and any books or papers affecting the same, in the same manner as he is authorized by this chapter to examine the affairs or funds of a domestic insurance corporation.

6. The superintendent of insurance may also receive for deposit from such a foreign insurance corporation securities or property in addition to the minimum deposit required by subdivision one of this section; but no such additional deposit now held by him or hereafter made with him shall be surrendered to such foreign insurance corporation unless the corporation's deposit with the superintendent of insurance after such surrender shall, at then market values, be at least equal to the deposit required to be made with him by subdivision one hereof. In case the deposit requirement of any state in which such foreign insurance corporation shall at the time be transacting business is greater than the minimum deposit herein provided, the additional deposit shall not be surrendered except upon the written consent of the insurance supervising official of such state.

7. Such a foreign insurance corporation now or hereafter authorized to transact the business of fire insurance in this state may also be authorized to transact the business of marine insurance when and in case it has complied with subdivision one of this section. Such a foreign insurance corporation now or hereafter authorized to transact the business of marine insurance in this state may also be authorized to transact the business of fire insurance when and in case it has complied with subdivision

one of this section. Separate statements of the fire and marine business transacted by such a foreign insurance corporation shall no longer be required or permitted. (Added by L. 1919, ch. 382, December 31.)

Section 63 of the Insurance Law of New York (Consol. Laws, ch. 28):

*Proceedings against and liquidation of delinquent insurance corporations.*—This section shall apply to all corporations, associations, societies, and orders to which any article of this chapter is applicable, and to all corporations, associations, societies, and orders which are subject to examination under any section of this chapter, or which are doing or attempting to do or representing that they are doing the business of insurance in this state, or which are in process of organization intending to do such business therein, anything as to any such corporations, associations, societies or orders provided in this article to the contrary notwithstanding; and the words "corporation" or "corporations" herein shall also include all such associations, societies, and orders as well as all voluntary or unincorporated associations.

1. Whenever any domestic corporation (a) is insolvent; or (b) has refused to submit its books, papers, accounts, or affairs to the reasonable inspection of the superintendent, or his deputy or examiner; or (c) has neglected or refused to observe an order of the superintendent to make good within the time prescribed by law any deficiency, whenever its capital, if it be a stock corporation, or its reserve, if it be a mutual corporation, shall have become impaired; or (d) has, by contract of reinsur-

ance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other corporation, association, society or order, without having first obtained the written approval of the superintendent; or (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or (f) has wilfully violated its charter or any law of the state; or (g) whenever any officer thereof has refused to be examined under oath touching its affairs; or (h) if such corporation be organized under article five-a, six, seven, eight, ten-a, or ten-b of this chapter, its condition is found, after examination, to be such that it could not meet the requirements for incorporation and authorization specified in such articles respectively; or (i) if such corporation has ceased to transact the business of insurance for a period of one year; or (j) commences voluntary liquidation or dissolution or attempts to commence or prosecute any action or proceeding to liquidate its business or affairs or to dissolve its corporate charter or to procure the appointment of a receiver, custodian or sequestrator under any law except this chapter; or (k) if an application is made for the appointment of a receiver, custodian or sequestrator of the corporation or its property, or a receiver, custodian or sequestrator is appointed by a federal court or such appointment is imminent; or (l) on consent of a majority of the directors,

stockholders or members; or (m) shall not organize and commence the transaction of its business or undertake its corporate duties within one year from the date of its incorporation as provided for in section sixty-six-a of this chapter, the superintendent may, the attorney general representing him, apply to the supreme court or any justice thereof in the judicial district in which the principal office of such corporation is located for an order directing such corporation to show cause why the superintendent should not take possession of its property and conduct its business, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require. (Sub. 1 as amended by L. 1930, ch. 196, March 28; L. 1922, ch. 69; L. 1918, ch. 119.)

2. On such application, or at any time thereafter, such court or the justice of the supreme court before whom such order is returnable may, in its or his discretion, issue an injunction restraining such corporation from the transaction of its business or disposition of its property until the further order of the court, and such court or the justice of the supreme court before whom such order is returnable may, on such application or at any time thereafter, issue such other injunctions or orders as may be deemed necessary to prevent interference with the possession and control, or the title, rights or interest of the liquidator or the conduct of the business or liquidation; or to prevent waste of the assets or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the corporation or its estate while in

the possession and control of the superintendent of insurance or while in liquidation. On the return of such order to show cause, and after a full hearing, the court or the justice of the supreme court before whom such order is returnable shall either deny the application or direct such superintendent, or his successors in office, forthwith to take possession of the property and conduct the business of such corporation, and retain such possession and conduct such business until, on the application, either of the superintendent, the attorney general representing him, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the superintendent to take possession has been removed and that the corporation can properly resume possession of its property and the conduct of its business. (Subd. 2, as amended by L. 1918, ch. 119, April 3.)

3. If, on a like application and order to show cause, and after a full hearing, the court or the justice of the supreme court before whom such order is returnable shall order the liquidation of the business of such corporation, such liquidation shall be made by and under the direction of such superintendent, and his successors in office, who may deal with the property and business of such corporation in their own names as superintendents, or in the name of the corporation, as the court or the justice of the supreme court before whom such order is returnable may direct, and shall be vested by operation of law with title to all of the property, contracts and rights of action of such corporation as of the date of the order so directing them to liquidate. The filing or recording of such order in any record

office of the state shall impart the same notice that a deed, bill of sale or other evidence of title duly filed or recorded by such corporation would have imparted. The rights and liabilities of any such corporation, and of its creditors, policyholders, stockholders and members, and of all other persons interested in its assets, shall, unless otherwise directed by the court, be fixed as of the date of the entry of the order directing the liquidation of such corporation in the office of the clerk of the county wherein such corporation had its principal office for the transaction of business upon the date of the institution of proceedings under this section.

* * * *

4. Whenever any of the grounds of jurisdiction over domestic corporations specified in subdivisions (a), (b), (c), (d), (e), (f) and (g) of subsection one of this section exist or arise with reference to any corporation incorporated by or existing under the government or laws of any country outside of the United States and authorized to transact the business of insurance and having assets in this state; or whenever any foreign corporation so authorized and having assets in this state has been placed in the hands of a receiver or had its property sequestrated in its domiciliary state or country or in any other state or country, the superintendent may, the attorney general representing him, apply to the supreme court or any justice thereof in the judicial district in which such corporation has its principal office for the transaction of business in this state, for an order directing such corporation to show cause why the superintendent should not take possession of its property and conserve its assets for

the benefit of its creditors, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders or the public may require. (Subd. 4 added by L. 1912, ch. 217, April 8.)

5. On such application, or at any time thereafter, such court or the justice of the supreme court before whom such order is returnable may, in its discretion, issue an injunction restraining such corporation and its officers, agents, and employees from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing, the court or the justice of the supreme court before whom such order is returnable shall either deny the application or direct the superintendent forthwith to take possession of the property and conserve the assets of such corporation, and retain such possession until, on the application either of the superintendent, the attorney general representing him, or of such corporation, it shall, after a like hearing, appear to the court that the ground for such order directing the superintendent to take possession has been removed and that the corporation can properly resume possession of its property and conduct its business. If, on such application, the court shall direct the superintendent to take possession of the property and conserve the assets of such corporation, the rights and duties of the said superintendent with reference to such corporation and its said assets shall be those heretofore exercised by and imposed upon ancillary receivers of foreign corporations in this state. (Subd. 5 added by L. 1912, ch. 217, April

8; as amended by L. 1918, ch. 119, April 3.)

6. For the purposes of this section, the superintendent shall have power to appoint, under his hand and official seal, one or more special deputy superintendents of insurance, as his agent and agents, and to employ such counsel, clerks, and assistants as may by him be deemed necessary, and give each of such persons such powers to assist him as he may consider wise. The compensation of such special deputy superintendents, counsel, clerks, and assistants, and all expenses of taking possession of and conducting the business of liquidating any such corporation shall be fixed by the superintendent, subject to the approval of the court, and shall, on certificate of the superintendent, be paid out of the funds or assets of such corporation. During the progress of any proceedings taken under this section, the superintendent, his deputies, or any examiner authorized by him and the special deputy superintendent of insurance acting for the said superintendent therein shall have all of the powers given to the superintendent, his deputy, or any examiner authorized by him, by section thirty-nine of this chapter, including the power to examine under oath the persons specified in such section, and to compel the production of books and papers as therein provided. (Formerly subd. 4.)

7. For the purposes of this section, the superintendent shall have power, subject to the approval of the court, to make and prescribe such rules and regulations as to him shall seem proper. (Formerly subd. 5.)

8. The superintendent shall transmit to the legislature, in his annual report, the names of the corporations so taken posses-

sion of, whether the same have resumed business or have been liquidated, and such other facts as shall acquaint the policyholders, creditors, stockholders, and the public with his proceedings under this section; and, to that end, the special deputy superintendent in charge of any such corporation shall file annually with the superintendent a report of the affairs of such corporation. (Formerly subd. 6.)

9. All acts of the superintendent of insurance in taking or continuing in possession of any property, or in the regulation, conduct, or liquidation of the business, of any corporation to which this section is applicable, since the first day of January, nineteen hundred and nine, whether such taking possession, continuing in possession, regulation, conduct, or liquidation was in pursuance of a contract, by mutual consent or otherwise, are hereby ratified, legalized, and confirmed. (Formerly subd. 7.)

10. On such application or at any time after the court or a justice thereof shall order the liquidation of the business of any such corporation, as provided in paragraph number three of this section, the superintendent of insurance may apply for the dissolution of such corporation, and the same, after due notice and hearing and such other procedure as to the court or justice shall seem proper, shall be dissolved. (Subd. 10 as amended by L. 1918, ch. 119, April 3.) (Formerly subd. 8.)

11. The order to show cause and the papers upon which the same is made in any proceeding instituted under the provisions of this section shall be served upon the corporation named in such order, if it be a domestic corporation, by delivering to the president or other head of the corporation,

the secretary or clerk to the corporation, the cashier, the treasurer or a director or managing agent; if it be a foreign corporation, by delivering to the president, vice-president, treasurer or assistant treasurer, secretary or assistant secretary, director or managing agent, or if the corporation lack any of those officers within the state, to the officer performing corresponding functions under another name; if it be a voluntary, unincorporated, or a joint-stock association, order, or society, by delivering to the president, vice president, treasurer, director, trustee or other officer or a member with managerial powers; if it be a Lloyds association, by delivering to the duly designated attorney-in-fact, a true copy of said order to show cause and the papers upon which it was granted and leaving the same with any such person within the state. When it is satisfactorily proved by the report of an examiner of the insurance department made in accordance with the provisions of section thirty-nine of this chapter or by affidavit that the officers, directors, trustees, or managing agents or members of the corporation, association, order or society named in said order to show cause, upon whom service is required to be made as above provided, or, if a Lloyds association be named in the order to show cause, that the duly designated attorney-in-fact, have departed from the state or keep themselves concealed therein or if such of the persons residing in this state and upon whom service is required to be made as above provided have resigned from their offices within forty days prior to the application for an order to show cause under the provision of this section, or that service cannot be made immediately

by the exercise of reasonable diligence, such order to show cause may provide for service thereof in such manner as the court or justice by whom the same is made, shall direct. (Subd. 11 added by L. 1911, ch. 366, June 19; as amended by L. 1922, ch. 69, March 6.) (Formerly subd. 9.)

12. At any time after the commencement of proceedings under an order of liquidation made pursuant to this section, the said superintendent may remove the principal office of the corporation in liquidation to the county of Albany. In event of such removal the court shall, upon the application of the superintendent, direct the clerk of the county wherein such proceeding was commenced to transmit all of the papers filed therein with such clerk to the clerk of the county of Albany, and the proceeding shall thereafter be conducted in the same manner as though it had been commenced in the county of Albany. (Subd. 12 added by L. 1913, ch. 29, February 19.)

# APPENDIX C

## The Litvinov Assignment

Washington, *November 16, 1933.*

My Dear Mr. President: Following our con-
ısations I have the honor to inform you that
e Government of the Union of Soviet Socialist
publics agrees that, preparatory to a final set-
ment of the claims and counterclaims between
e Governments of the Union of Soviet Socialist
publics and the United States of America and
e claims of their nationals, the Government of
e Union of Soviet Socialist Republics will not
ke any steps to enforce any decisions of courts
initiate any new litigations for the amounts
mitted to be due or that may be found to be
e it, as the successor of prior Governments of
ıssia, or otherwise, from American nationals,
cluding corporations, companies, partnerships,
associations, and also the claim against the
ited States of the Russian Volunteer Fleet,
w in litigation in the United States Court of
aims, and will not object to such amounts being
signed and does hereby release and assign all
ch amounts to the Government of the United
ates, the Government of the Union of Soviet
cialist Republics to be duly notified in each case
any amount realized by the Government of the
ited States from such release and assignment.
The Government of the Union of Soviet So-
alist Republics further agrees, preparatory to the

settlement referred to above not to make any claim with respect to:

(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

I am, my dear Mr. President,

Very sincerely yours,

MAXIM M. LITVINOFF,
*People's Commissar for Foreign Affairs,*
*Union of Soviet Socialist Republics.*

MR. FRANKLIN D. ROOSEVELT,
*President of the United States of America,*
*The White House.*

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THE WHITE HOUSE,
*Washington, November 16, 1933.*

MY DEAR MR. LITVINOV: I am happy to acknowledge the receipt of your letter of November 16, 1933, in which you state that:

"The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Re-

publics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

"The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:

"(a) judgments rendered or that may be rendered by American courts insofar as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

"(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof."

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized

by the Government of the United States from the release and assignment to it of the amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

I am, my dear Mr. Litvinov,

Very sincerely yours,

FRANKLIN D. ROOSEVELT.

Mr. MAXIM M. LITVINOV,

*People's Commissar for Foreign Affairs,*

*Union of Soviet Socialist Republics.*

## APPENDIX D

EMBASSY OF THE
UNITED STATES OF AMERICA,
*Moscow, January 7, 1937.*

MR. MAXIM M. LITVINOV,
*People's Commissar for Foreign Affairs,*
*Union of Soviet Socialist Republics, Moscow.*

MR. PEOPLE'S COMMISSAR: I have the honor to inform you that it is the understanding of the Government of the United States that the Government of the Union of Soviet Socialist Republics considers that by and upon the formation of the Union of Soviet Socialist Republics and the adoption of the Constitution of 1923 of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights, or interests therein located abroad of all corporations and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors.

The Government of the United States further understands that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics of the Union of Soviet Socialist Republics or their predecessors from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, in litigation in the

United States Court of Claims, and that the Government of the Union of Soviet Socialist Republics did release and assign all such amounts to the Government of the United States by virtue of the note addressed by you to the President of the United States on November 16, 1933.

Will you be good enough to confirm the understanding which the Government of the United States has in this matter, concerning the law of the Russian Socialist Federated Soviet Republic, the Constitution and laws of the Union of Soviet Socialist Republics, and the intention and purpose of the Government of the Union of Soviet Socialist Republics in the above-mentioned assignment?

I am, Mr. People's Commissar,

Very sincerely yours,

(Signed) LOY W. HENDERSON,

*Chargé d'Affairs ad interim of the United States of America.*

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Moscow, January 7, 1937.

MR. LOY W. HENDERSON,

*Chargé d'Affaires ad interim of the United States of America, Moscow.*

MR. CHARGÉ D'AFFAIRES: In reply to your note of January 7, 1937, I have the honor to inform you that the Government of the Union of Soviet Socialist Republics considers that by and upon the formation of the Union of Soviet Socialist Republics and the adoption of the Constitution of 1923 of the Union of Soviet Socialist Republics, the Union of Soviet Socialist Republics acquired the right to dispose of the property, rights, or interests therein located abroad of all corporations

and companies which had theretofore been nationalized by decrees of the constituent republics or their predecessors.

You are further informed that it was the purpose and intention of the Government of the Union of Soviet Socialist Republics to assign to the Government of the United States, among other amounts, all the amounts admitted to be due or that may be found to be due not only the Union of Soviet Socialist Republics but also the constituent republics of the Union of Soviet Socialist Republics or their predecessors from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, in litigation in the United States Court of Claims, and that the Government of the Union of Soviet Socialist Republics did release and assign all such amounts to the Government of the United States by virtue of the note addressed by me to the President of the United States on November 16, 1933.

I have the honor, therefore, to confirm the understanding, as expressed in your note of January 7, 1937, which the Government of the United States has in this matter, concerning the law of the Russian Socialist Federated Soviet Republic, the Constitution and laws of the Union of Soviet Socialist Republics, and the intention and purpose of the Government of the Union of Soviet Socialist Republics in the above-mentioned assignment.

I am, Mr. Chargé d'Affaires,

Very sincerely yours,

G. LITVINOFF,

*People's Commissar of Foreign Affairs,*

*Union of Soviet Socialist Republics.*

# APPENDIX E

## NEW YORK CIVIL PRACTICE ACT

§ 476. JUDGMENT ON PLEADINGS OR ADMISSION OF PART OF CAUSE. Judgment may be rendered by the court in favor of any party or parties, and against any party or parties, at any stage of an action or appeal, if warranted by the pleadings or the admissions of a party or parties; and a judgment may be rendered by the court as to a part of a cause of action and the action proceed as to the remaining issues, as justice may require. (New. See Code § 511, in part; § 547.)

## NEW YORK RULES OF CIVIL PRACTICE

RULE 113. SUMMARY JUDGMENT. When an answer is served in an action,

1. To recover a debt or liquidated demand arising on a contract express or implied in fact or in law, sealed or not sealed; or

2. To recover a debt or liquidated demand arising on a judgment for a stated sum; or

3. On a statute where the sum sought to be recovered is a sum of money other than a penalty; or

4. To recover an unliquidated debt or demand for a sum of money only arising on a contract express or implied in fact or in law, sealed or not sealed, other than for breach of promise to marry; or

5. To recover possession of a specific chattel or chattels with or without a claim for the hire thereof or for damages for the taking or detention thereof; or

6. To enforce or foreclose a lien or mortgage; or

7. For specific performance of a contract in writing for the sale or purchase of property, including such alternative and incidental relief as the case may require; or

8. For an accounting arising on a written contract, sealed or not sealed.

The complaint may be dismissed or answer may be struck out and judgment entered in favor of either party on motion upon the affidavit of a party or of any other person having knowledge of the facts, setting forth such evidentiary facts as shall, if the motion is made on behalf of the plaintiff, establish the cause of action sufficiently to entitle plaintiff to judgment, and if the motion is made on behalf of the defendant, such evidentiary facts, including copies of all documents, as shall fully disclose defendant's contentions and show that his denials or defenses are sufficient to defeat plaintiff, together with the belief of the moving party either that there is no defense to the action or that the action has no merit, as the case may be, unless the other party, by affidavit or other proof, shall show such facts as may be deemed by the judge hearing the motion sufficient to entitle him to a trial of the issues. If upon such motion made on behalf of a defendant it shall appear that the plaintiff is entitled to judgment, the judge hearing the motion may award judgment to the plaintiff, even though the plaintiff has not made a cross-motion therefor.

If the plaintiff or defendant in any action set forth in subdivisions 3, 4, or 5 hereunder shall fail to show such facts as may be deemed, by the judge hearing the motion, to present any triable issue

of fact other than the question of the amount of damages for which judgment should be granted, an assessment to determine such amount shall forthwith be ordered for immediate hearing to be tried by a referee, by the court alone, or by the court and a jury, whichever shall be appropriate. Upon the rendering of the assessment, judgment in the action shall be rendered forthwith.

When in any actions in cases set forth in subdivisions 6, 7, and 8 hereunder the judge hearing the motion has been convinced that there is no preliminary triable issue of fact, the court shall forthwith render an appropriate judgment or order and thenceforth the action shall proceed in the ordinary course.

Where an answer is served in any action setting forth a defense which is sufficient as a matter of law, where the defense is founded upon facts established *prima facie* by documentary evidence or official record, the complaint may be dismissed on motion unless the plaintiff by affidavit, or other proof, shall show such facts as may be deemed by the judge hearing the motion, sufficient to raise an issue with respect to the verity and conclusiveness of such documentary evidence or official record.

This rule shall be applicable to counterclaims, so that either party may move with respect to the same as though the counterclaim were an independent action. The court in its discretion may provide for the withholding of entry of judgment until the disposition of the issue in the main case.

This rule shall be applicable to all pending actions. (As amended March 14, 1932, and May 11, 1933; in effect June 15, 1933.).

# APPENDIX F

DEPARTMENT OF STATE,
*Washington, March 26, 1938.*

ROLAND S. MORRIS, ESQ.,
*Chairman, Association of American Creditors of Russia,*
*120 Broadway, New York, N. Y.*

SIR: The Department has received your letter of March 23, 1938, regarding the disposition to be made of funds that may be recovered under the Litvinoff Assignment of November 16, 1933.

The Department has always had in mind that whatever funds are recovered as a result of that Assignment would be made available, in whole or in part, to American private claimants.

Very truly yours;
For the Secretary of State:
R. WALTON MOORE, *Counselor.*



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